Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

K. DANIEL RUPP,

Petitioner,

v.

DAVID PHILLIPS,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **May government employees be fired, without legal recourse, for cooperating with the Federal Bureau of Investigation's efforts to prevent domestic terrorism?**

2. **May a court decide as a matter of law that the compelling national interest in safeguarding citizen cooperation with law enforcement officers in the prevention of terrorism is outweighed by a federal public defender's asserted interest in prohibiting such cooperation?**

PARTIES TO PROCEEDING

The parties to the proceedings below were the Petitioner K. Daniel Rupp and Respondent David Phillips.

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The Petitioner K. Daniel Rupp, respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled proceeding on July 23, 2001.

OPINIONS BELOW (RULE 14.1(D))

The "unpublished" opinion of the Court of Appeals for the Tenth Circuit (App. A) is found at 2001 WL 826656 (10th Cir. July 23, 2001).

The Order of the United States District Court for the District of Kansas (App. B) awarding defendant summary judgment was not reported or otherwise published.

JURISDICTION (RULE 14.1(E), (H), (I))

The decision of the Court of Appeals ("the Tenth Circuit") of which review is sought was rendered in an opinion filed July 23, 2001. An extension of the deadline for filing this Petition was granted by Circuit Justice Breyer on October 11, 2001. That extension expires November 5, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(i)

CONSTITUTIONAL PROVISIONS INVOLVED (RULE 14.1(F))

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deprive any person of life, liberty or property, without due process of law.

STATEMENT OF THE CASE (RULE 14.1 (G,H,I))

Petitioner Daniel Rupp, an investigator employed by the Federal Public Defender in Wichita, Kansas, was fired from his job because he cooperated with the FBI in a criminal investigation of a suspected terrorist who promoted and threatened the use of biological weapons within the United States. The suspect, Timothy Tobiason, published information about the manufacture and deployment of biological and chemical weapons of mass destruction. In conversations with Rupp, Tobiason threatened that he possessed biological weapons "and that he was going to use them against the United States Government and its people and officials." App. C6. Rupp believed Tobiason posed a real and imminent threat to public safety. Therefore, Rupp reported these threats to the FBI. Rupp also communicated with Tobiason, attempting to persuade him not to resort to drastic measures. Rupp was terminated by Respondent Phillips, on the grounds that these communications violated an order prohibiting Rupp's cooperation with the FBI. Rupp sued Phillips, asserting that the termination violated the First Amendment of the United States Constitution.

The courts below held that a public employer's alleged interests in preventing potential conflicts of interest were more important than "Mr. Rupp's interest in his speech," (App. A8-A11, A13-A14) and therefore granted or affirmed summary judgment in Phillips' favor. The Tenth Circuit panel held that "Mr. Rupp's continued cooperation with the FBI did not implicate the same level of public concern as the speech of employees who expose official wrongdoing, or who participate in protected political activity." App. A12. The Tenth Circuit panel also concluded that Mr. Rupp's communications to the FBI about a suspected terrorist "cannot be deemed either as new or as irreplaceable as the most protected types of speech." *Id.* The Tenth Circuit concluded that Phillips' "interests [as employer] in regulating Mr. Rupp's speech were substantial, and outweighed Mr. Rupp's interest in his speech." App. A13.

A. The Facts Material to this Court's Consideration of the Questions Presented.

Mr. Rupp, an avid gun collector who regularly visited gun shows, met Timothy Tobiason coincidentally. As the Tenth Circuit panel explained,

> Sometime during 1997, Mr. Rupp met a vendor named Timothy Tobiason at one of these shows. Mr. Tobiason was selling books that described how to manufacture biological and chemical weapons of mass destruction. After conversing with Mr. Tobiason, Mr. Rupp learned that Mr. Tobiason "was very disgruntled with regard to how he had been treated by the government in business and in his personal life." [citation omitted] On June 6, 1998, Mr. Rupp attended another weekend gun show, where he again encountered Mr. Tobiason. Mr. Tobiason was now selling a book entitled "'Advanced Biological Weapons Design and Manufacture," which contained instructions on how to culture and spread deadly diseases, as well as language threatening the government.[1] Mr. Rupp talked with Mr. Tobiason, and became convinced that not only had Mr. Tobiason actually begun to manufacture chemical weapons, but that he had plans to use them against agents of the government. According to Mr. Rupp, Mr. Tobiason stated that the damage caused by "the Oklahoma City bombing would be nothing" compared to what he was prepared to do.

App. A2.

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[1] The full title of Tobiason's 1998 manual is particularly descriptive: "Scientific Principles of Improvised Warfare and Home Defense-Advanced Biological Weapons Design and Manufacture-Biological Entry-Bacteria Based Weapons-Why pay to recruit troops and build factories to wage war and kill for you when nature will do it for free[.] Or, if you can make jello, you can wipe out cities—Enjoy!" App. L1.

In his 1998 Biological Weapons manual, Mr. Tobiason described methods for manufacturing and delivering anthrax and other deadly biological agents. He also set forth anti-government justifications for using these weapons of mass destruction. The manual instructs readers how to spread anthrax and other pathogens through the mails and as "invisible, reproducible and highly effective booby traps." The following "author's note" from Tobiason's text is illustrative:

> The ultimate weapon that citizens can use against a tyrannical government is not only the knowledge of how to recover, grow and deliver these diseases as a weapon, but to be able to arm and equip an entire army with this ability. . . . The only safe people in the government are those living in space suits since any vehicle, piece of mail, package, or object can be easily infected. . . . If the laws of this nation are not going to be fair then it is my right, and my duty to fight this government any way I can, even if it costs me my own life.

App. L19-L21.

At the June 1998 gun show, Tobiason discussed how to manufacture and distribute anthrax and specific methods of conducting germ warfare. For example, Tobiason told Rupp that he had grown his own culture medium by using household jello. App. C6, ¶ 20. In response, Rupp asked Tobiason, "Where are you going with this?" Tobiason answered, "It ain't going to be pretty, and it's coming real soon." App. C6, ¶ 21. Rupp believed that "there was imminent danger that Tobiason would carry out his threats" and violate federal and state laws. App. C7, ¶ 22. *See* 18 U.S.C. § 175 (regarding creation of biological weapons); 18 U.S.C. § 2332a et seq. (regarding use of weapons of mass destruction).

Rupp immediately contacted federal law enforcement agencies about these threats of bioterrorism, and was directed

to FBI Agent Paul Vick. Based on the information Rupp provided about these threats of bioterrorism, Agent Vick agreed that a public safety issue was involved here. App. D12. He also confirmed that Rupp had a "real concern" that the suspect might carry out these threats. App. D13. Agent Vick appreciated the information provided by Rupp. App. D8-D9. Accordingly, he asked Rupp if he would be willing to participate in an FBI investigation of Tobiason by wearing a "wire" and tape-recording a future conversation with Tobiason. App. D9.

After reporting Tobiason to the FBI and receiving the FBI request, Rupp discussed his communications with the FBI about Tobiason with his supervisors at the Wichita Federal Public Defender's office. His supervisors commended Rupp's actions in reporting Tobiason's threats, but restricted further interactions between Rupp and Tobiason or the FBI. The Tenth Circuit panel acknowledged a fact dispute about the scope and focus of the orders issued to Rupp by his supervisors. App. A3-A4. Rupp testified that after a series of conversations with his immediate supervisor, Rupp understood that his employer wanted him to avoid placing himself in a situation where he could become a witness. App. E21; App. J1. On the other hand, Phillips contends that Rupp was instructed to have no further involvement with the FBI on this matter whatsoever, no matter how limited or coincidental, without first obtaining permission from a Federal Public Defender supervisor. App. H2-H3. According to Phillips, Rupp was ordered not to communicate with the FBI unless Rupp first obtained Phillips' permission to do so, even if incidental follow-up contact with Tobiason occurred. *Id.*

Rupp informed Agent Vick of his employer's instructions, as Rupp understood them. Accordingly, Agent Vick assured Rupp that he would not be deployed as an operative, and stressed that there was neither an intent nor a possibility that Rupp would become a witness. App. E55-E56; App. D9-D10; App. G. Instead, Agent Vick made two requests to Rupp. First, Agent Vick wanted to be notified if

Rupp happened to encounter Tobiason in the future. Vick testified: "I just asked Dan that if he did have an occasion to go to these shows and if he saw this individual and had conversations with him, I would of course be very happy to know what this individual told him." App. D15-D16.

Second, Agent Vick encouraged Rupp to write one letter to Tobiason—a letter Rupp wanted to write in any event. "Agent Vick was concerned about what the man could be capable of on a short time basis." App. I3. Rupp was very concerned that Tobiason might engage in bioterrorism soon. Rupp wanted to use his rapport with Tobiason to discourage such drastic action. "I felt like I was the closest person to him and seemed to be one of the few he would talk to." App. J3. Rupp testified, "I told Paul Vick, I said I'm going to include a clause in here *begging this guy not to act before we talk.*" App. E25 (emphasis added). Mr. Rupp therefore wrote a short note to Tobiason, concluding, ". . . and please do not act until we talk." App. K1.

Tobiason responded in writing to Rupp's plea not to act: "Dan, I have already decided an effective and quite appropriate solution to both the justice system and the government's actions. Thanks anyway." App. D14. Rupp brought Tobiason's reply to the June letter to the FBI. Tobiason's letter also indicated that Tobiason might attend a September 1998 gun show in Wichita. Rupp informed Agent Vick that he intended to attend that gun show. App. I3.

Agent Vick noted that if Rupp happened to attend the September gun show, Vick would be interested in whether Tobiason was still serious about the threats. App. I9. Agent Vick's testimony confirms that he did not give Rupp specific instructions, orchestrate a "planned encounter," or otherwise involve Rupp as part of an "undercover" FBI operation involving Tobiason:

> Q. Did you ever give him specific directions of contact to make?

> A. Other than discussing this letter to see what kind of response it would generate back, I don't remember telling him anything other than what he was going to do really in his private time on weekends going to these gun shows as a private citizen, not on company time, you might say, and if he came across more information that we'd be interested in, I encouraged him to continue to provide us with that information.

App. D26. Mr. Rupp would have attended the September 1998 gun show in Wichita regardless of his conversation with Agent Vick. App. I9.

At the September 1998 gun show, Rupp received new information from Tobiason that was especially terrifying, and Rupp reported it to the FBI. These conversations, detailed in the Rupp affidavit filed in opposition to Phillips' summary judgment motion, deserve special attention. App. C8-C9. In one conversation, Tobiason told Rupp that he would make the plague virus available to entities perceived as hostile to the United States: Tobiason said he wanted their assistance in prosecuting a war against the United States government, because he said, "the government needs to be stopped." He said he wants "this stuff" (the plague virus) out there. . . . I asked if he had already mailed the plague virus. Tobiason responded, "I could do it." App. C8, ¶35.

The next day, (September 14, 1998) Rupp received even more chilling information from Tobiason:

> I [Rupp] said, "I hope to see you next year" (at the gun show). Tobiason replied, "You won't see me next year, you'll read about it (in the news). They've gone too far." I tried to talk him out of carrying out any of his threats. However, Tobiason advised me that his mind was made up. He said "It's too late for that." Tobiason compared himself to Timothy McVeigh . . .

App. C9, ¶¶41-42. Rupp disclosed this information to the FBI as well. *Id.*

When asked about whether he expected additional communications with Rupp after they spoke about Tobiason's comments at the September 1998 Wichita gun show, Vick testified:

> Well, not after the last conversations that Mr. Rupp had with this individual. It seemed that something horrendous or something was going to happen which was going to cause him not to be around much longer. So it was kind of up in the air.

App. D27.

After receiving orders from his supervisors in June 1998, Rupp had severely limited the services he was originally asked to perform to assist the FBI. Rupp did not "wear a wire" and enable the FBI to tape record conversations. He was not designated as a "confidential informant" by the FBI. App. D9-D10, D34-D35. His interactions with Tobiason were limited to three communications: the June letter (urging Tobiason not to act), Tobiason's response, and conversations occurring at the September 13-14, 1998 Wichita gun show. Rupp acknowledges he took these steps without first bringing them to the attention of his supervisor and seeking express permission from her to contact the FBI. At his deposition, Rupp was repeatedly questioned about his failure to seek permission from his employer in advance of contacts with the FBI.

He responded:

> I had a guy on one hand who was threatening to kill a lot of people. I had [immediate supervisor] Cindy [McNorton] on the other hand threatening my job. I knew that it would be illegal for them to prevent me from helping the FBI prevent this disaster, possible disaster.

App. E18.

> Q. (By defense counsel:) My question is you didn't tell Cindy that you had sent the letter to Tobiason or show her a copy of the letter to Tobiason because you knew Cindy would fire you, right?
>
> A. I knew that I was going to write him a letter because I had the right. I was going to help the FBI because I had a right and duty to do it.

App. E28.

> Q. You had represented to Cindy that you were not going to sneak around her in this matter and I'm kind of curious as to what your thought process was as to why you did not show the letter to Cindy?
>
> A. At the point where [FBI Agent] Paul Vick basically said well, what do you want to do like lose this many people over this. *At that point, you know, I was concerned more about the, you know, the emergency of the guy putting together something and using it.*
>
> Q. More concerned about that as opposed to what?
>
> A. *Anything.*

App. E26 (emphasis added).

Phillips fired Rupp upon learning that Rupp had written a letter to Tobiason and had reported conversations with Tobiason to the FBI. App. H3-H4. Rupp exhausted post-termination administrative procedures. App. A4. In a letter to Phillips attempting to explain the minimal steps he had taken to help the FBI address an urgent and potentially disastrous threat to public safety, Rupp emphasized these actions were unrelated to his employment by the Federal

Public Defender and did not compromise his job-related responsibilities. App. I.

Nevertheless, Phillips reconfirmed Rupp's termination. Phillips asserted that Rupp's communications with the FBI regarding Tobiason "placed at risk [is] the institutional integrity of the entire office." App. H4. Tobiason, a Nebraska resident, was not a client of the Wichita office of the Federal Public Defender, nor had Tobiason been charged with a crime. Nevertheless, Respondent Phillips cited inherent or general conflict of interest canons as a basis for prohibiting Petitioner's cooperation with the FBI, stating "given the adversarial role of a public defender's office [with the FBI], further action on his [Petitioner's] part in this regarding [sic] would be forbidden." App. H2.

Throughout his termination proceedings and in his submission opposing summary judgment, Rupp offered evidence that his limited assistance to the FBI neither posed a conflict of interest nor threatened the institutional integrity of the Federal Public Defender's office. App. E55-E56; App. I; App. D9-D10. An FBI agent described the efforts taken to avoid any conflicts of interest:

> Appropriate measures were taken to ensure Mr. Rupp would not be called upon as a witness. . . . At no time did Mr. Rupp's assistance involve or reveal any information regarding the Public Defender's Office. . . Based upon Mr. Rupp's employment with the Federal Public Defender, this office took special care to ensure that his actions as a conscientious citizen would not reveal or violate any confidences entrusted to him and that the only information to be provided would involve violations of the criminal laws.

App. G1-G2.

The FBI also confirmed the importance of Mr. Rupp's cooperation: "[T]he information Mr. Rupp brought to our attention was of a serious nature as it involved threats of

potential harm and death to many innocent individuals and law enforcement officers." App. G2.

In fact, Agent Vick's supervisor contacted Phillips personally in an effort to arrange a meeting to explain the limited nature of Rupp's cooperation with the FBI, its value to the agency, and the efforts made to avoid a conflict of interest. App. D35; App. M1-M3. Phillips declined to participate in the proposed meeting. App. M3.

Mr. Rupp was extremely proud of his four-year record of excellence as a federal employee. He believed that he had "performed his job with professionalism." App. I9. After his termination, Mr. Rupp was personally devastated by the loss of his federal employment and the Respondent's characterization of the actions he took to prevent an extraordinary crime and avert a potential national disaster. App. E58-E60.

B. Proceedings Below.

After exhausting all other avenues to regain his job, Rupp brought this action in March 1999 against Phillips. His claims have never been tried. Instead, Phillips brought a motion for summary judgment in September 1999, which was granted on October 19, 1999.

In his summary judgment motion, Phillips presented three arguments. First, he contended that Rupp was not fired for speaking "on matters of public concern" within the meaning of *Connick v. Myers,* 461 U.S. 138, 146-47 (1983). Second, he contended that Rupp's speech was workplace-related speech for which he could be fired under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), because Phillips' interests as an employer in restricting Rupp's speech outweighed Rupp's interests as a speaker. Third, he contended that he was entitled to qualified immunity under *Harlow v. Fitzgerald,* 457 U.S. 800, 813 (1982).

In granting summary judgment to Phillips, the District Court ruled that "Plaintiff's initial contact with the FBI

regarding his discussions with Mr. Tobiason were clearly matters of public concern and an expression of free speech." App. B8. However, applying the *Pickering* balancing test, the District Court held: "Plaintiff's continued involvement was unnecessary for the investigation. Thus, plaintiff's continued assistance is not, in this Court's opinion, an expression of speech protected by the First Amendment." App. B9.

In reviewing the employer's interests, the District Court characterized Rupp's expressive activities as an "investigation on behalf of a law enforcement agency." App. B12. It concluded, "Plaintiff's actions of disobeying specific instructions, concealing his involvement until he knew his assistance would be discovered, the nature of his position within the FPD and the knowledge of Mr. Tobiason concerning plaintiff's employment, render defendant's interest much greater than those of plaintiff in continuing his role in the investigation." App. B14.

On July 23, 2001 the Tenth Circuit affirmed summary judgment. App. A. The Tenth Circuit affirmed solely because "under the *Pickering/Connick* balancing test, the interests of the FPD outweigh those of Mr. Rupp." App. A11. It held that "[w]e cannot agree that Mr. Rupp's continued cooperation with the FBI should be characterized as involving the most substantial of public concerns." *Id.* Its rationale for that conclusion was based on three premises: the speech in Rupp's continued cooperation was not "irreplaceable," or "new," and did not expose *public* wrongdoing. App. A12-A13. Neither the District Court nor the Tenth Circuit cited any decision of this Court as legal authority for the notion that any of these three factors should govern the weight that Rupp's speech should receive.

The Tenth Circuit also agreed with the District Court that "Mr. Phillips's interests in regulating Mr. Rupp's speech were substantial, and outweighed Mr. Rupp's interest in his speech." App. A13. The Tenth Circuit agreed "with Mr. Phillips that an agency such as the FPD, which in a sense

works against law enforcement agencies when it works on behalf of its clients, may legitimately have heightened concerns about its employees' involvement with law enforcement." App. A13-A14. It emphasized that Mr. Phillips "has introduced evidence that Mr. Rupp's behavior created a disruption in the FPD office and disturbed its ability to carry out its mission." App. A13. The evidence cited by the Tenth Circuit did not involve the consequences of the cooperation itself, but instead involved the consequences of Rupp's failure to follow the instructions of his supervisors. App. A13-A14. The Tenth Circuit did not reach the question of qualified immunity. *Id.*

Although Rupp was terminated for ongoing communications with the FBI and Tobiason despite his employer's orders, neither the District Court nor the Tenth Circuit saw a need to analyze the content of those communications in their lengthy opinions. For example, neither opinion mentions Rupp's effort to prevent an act of terrorism by making a written request to Tobiason to refrain from taking any action until they could talk. App. A3. Nor does either opinion make any reference to the new and different threats and representations that Tobiason made to Rupp for the first time in their September 1998 conversations, and which Rupp reported to the FBI. App. B4-B5; App. A3-A5. Yet each court below easily concluded, prior to trial, that Rupp's speech was not "new" or "irreplaceable."

In addition, the courts below did not acknowledge Petitioner's considerable evidence that, after receiving his employer's directives, Rupp severely restricted his cooperation with the FBI and declined the FBI request to serve as a confidential informant, to tape record conversations, to become a witness, or otherwise to become an "undercover" operative in an FBI investigation. App. D9, D34-D35; App. I. To the contrary, in evaluating the propriety of summary judgment, the Tenth Circuit adopted the movant's characterization of Rupp's activities as

"undercover" participation in an FBI investigation. App. A12.

REASONS FOR GRANTING THE WRIT (RULE 14.1(J))

I. THIS COURT MUST ASSURE THAT THE PUBLIC'S COMPELLING INTEREST IN SAFEGUARDING COOPERATION WITH LAW ENFORCEMENT TO PREVENT THREATENED CRIMES IS GIVEN SIGNIFICANT WEIGHT WHEN EVALUATING THE FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES.

This case is more than a run-of-the-mill government employee speech case. It is a case presenting a public policy issue of enormous importance to the Nation. The courts below found as a matter of law that the Petitioner could be fired for cooperating with the Federal Bureau of Investigation and making other statements important to the prevention of bioterrorism. The Tenth Circuit reached this striking conclusion through a misguided application of the *Pickering* balancing test. It ignored the compelling interests of the Petitioner, the public and law enforcement in the free flow of information important to the protection of society. If the interests of the public in safeguarding such speech can be so easily left out of the equation, then that equation needs revision by this Court.

The Tenth Circuit held that "under the *Pickering/Connick* balancing test, the interests of the FPD outweigh those of Mr. Rupp. We cannot agree that Mr. Rupp's continued cooperation with the FBI should be characterized as involving the most substantial of public concerns." App. A11. The Tenth Circuit also placed insufficient weight on the First Amendment interests of federal law enforcement officials as listeners to the Petitioner's statements. Making matters worse, the fact that Rupp's speech involved bioterrorism (rather than padding of a

public employee's expense account or other official misconduct) caused that court to give the speech even *less* weight in the balancing. The Tenth Circuit's decision created an unprecedented standard under which cooperative and preventative statements will not be valued in the *Pickering* balancing unless such statements are so necessary to the existence of an investigation that the investigation will collapse if the speaker becomes silent. Such a standard, as applied in this case, results in a virtual *per se* exclusion of highly valuable speech from First Amendment protection.

A. The Tenth Circuit's *Pickering* Balance was Improperly Skewed by its Disregard of the Importance to the Public and the FBI of Rupp's Preventative and Cooperative Speech.

The Tenth Circuit's approach to the interests of federal law-enforcement officials and the safety of the general public disregarded fundamental values articulated by this Court. As this Court recognized in *Illinois v. Gates*, 462 U.S. 213, 238 (1983), "'the most basic function of any government' [is] 'to provide for the security of the individual and of his property.'" (quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)). *Accord Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) ("Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government[.]"); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164 (1951) ("[T]he greatest of all public interests [is] that of national security."). Here, protecting speech furthers the public's compelling interest in its own security, and thus should have received substantial weight. Yet it received no meaningful weight as the Tenth Circuit balanced the relative interests.

1. Under this Court's rulings, Rupp's continued cooperation with the FBI should have been highly valued.

In its analysis of whether Rupp's continued cooperation with the FBI warranted First Amendment protection, the Tenth Circuit did not focus on either the interests of the public, or the FBI as a "listener," in continued cooperation from Rupp. This Court has repeatedly recognized that the First Amendment protects both the interests of speakers *and* the interests of listeners. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-7 (1976) (First Amendment protection is afforded "to the communication, to its source and to its recipients both"). This Court "has referred to a First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.'" *Id.* at 756 (quoting with approval from *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972)). In this case, however, the interests of the listeners of the Petitioner's cooperative statements – FBI agents acting on behalf of the public – were left out of the Tenth Circuit's equation. *See, e.g.*, App. 11 and App. A13.

The Tenth Circuit's approach improperly turned on whether the Petitioner's continued cooperation with the FBI was "imperative" to the FBI's investigation. That requirement was not derived from any of this Court's decisions. The Tenth Circuit concluded Petitioner's involvement was not "irreplaceable," based on the FBI agent's affirmative answer to the question, "you were proceeding under the assumption that you would be able to continue with any investigation and potential prosecution of Mr. Tobiason without the assistance of Mr. Rupp?" App. D35-D36 cited by Tenth Circuit App. A12. Of course, the FBI would "proceed under" that "assumption." No law-enforcement agency would expect to abandon the investigation of a potential bioterrorist simply because a single cooperative witness becomes silent. Moreover, the

standard imposed by the Tenth Circuit panel is apparently so severe that a fact issue was not created even when Agent Vick refused to concede that Rupp's cooperation was not "vital" to the FBI investigation. App. D36.[2]

By valuing only that speech that is "irreplaceable" to the investigation, the Tenth Circuit overlooked well-established pronouncements of this Court. Those pronouncements reject the notion that speech from one source should not be protected where it could have been received from another source. *See, e.g., Virginia State Bd. of Pharmacy,* 425 U.S. at 757 n. 15. As this Court recognized in *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221, 231 (1987), "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Id.* at 231. The test that the Tenth Circuit invented conflicts with these fundamental principles, and should be rejected.

By its very nature, the Tenth Circuit's "imperative" requirement also impermissibly chills valuable speech. A citizen deciding whether to cooperate in an investigation will seldom if ever be able to understand at that moment whether his or her cooperation is "imperative" or "irreplaceable." The answer depends upon information about the investigation as a whole and the crime that is unknown by the citizen. Because too much valuable speech will be deterred by this type of requirement, this Court should grant certiorari in order to eliminate it.

2. This Court has never limited the First Amendment's protections to "new" speech.

The second reason offered by the Tenth Circuit for placing little value on Rupp's speech was that his "continued speech to the FBI" was not "new." App. A12. Like the

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[2] [Phillips' counsel]: "Therefore, [Rupp] wasn't vital to the prosecution of Mr. Tobiason?" [Agent Vick] "*By–I'm struggling with –* " **Q.** "I'll withdraw the question." **A.** –"*with the vital part.*" **Q.** "I'll withdraw the question." [Phillips' Counsel]: "Nothing further."

"imperative" requirement, the Tenth Circuit did not derive this test from any decision of this Court, but created it on its own. It is both factually unsupported and legally misguided.

The Tenth Circuit did not point to any factual basis for its conclusion that the information disclosed in Rupp's later speech was not "new." To the contrary, the uncontradicted evidence demonstrated that Rupp's written exchange with Tobiason in the summer of 1998, which Rupp disclosed to the FBI, resulted in new, more specific evidence about the likelihood of a biological attack. App. E25-E26; App. K1. App. D14. The uncontradicted evidence in the record further demonstrated that the FBI received startling "new" information from Rupp relevant to the risk of bioterrorism, as the result of their contacts in mid-September 1998. The statements of Tobiason that Rupp reported to the FBI shortly before he was fired included the following:

- "Tobiason said that he planned to attend the Sioux City, Iowa gun show in two weeks and that he had 'a surprise for the people screwing with him.'" App. C9.

- "Tobiason said he had tried to get his story [regarding his failed efforts to obtain a patent] out to news media companies, including the national press. However, they all turned him down, including the *National Enquirer*. App. C9. Tobiason stated, "'I'm not afraid to die. I'm ready to fight. What do I have to do, kill a million people to get them to print my story?'" App. C9.

- "Tobiason discussed putting the plague virus on scotch tape, then putting it in letters, and mailing the letters to all National Rifle Association members nationally. The reason he said he wanted to do this was so that the NRA members could culture the virus." App. C8.

Moreover, there is no support in the decisions of this Court for the notion that speech should be safeguarded from

suppression or retaliation only if it is "new." Such a rule would encourage suppression, because future instances of banned speech would no longer be "new." Such a rule would also encourage retaliation, by allowing any repetition of otherwise protected speech to become a legitimate target of punishment.

The Tenth Circuit's novel articulation of this distinction between old and new speech also creates a conflict with a decision of the Sixth Circuit, which rejected it as "absurd." *Chappel v. Montgomery County Fire Protection District No. 1*, 131 F. 3d 564, 577 (6th Cir. 1997)("Indeed, the defendants' suggestion that such speech is not protected, by virtue of its second-in-time status, is absurd. . . . What we reject is the suggestion that speech which comes late to a public debate is unprotected simply because the controversy has already been defined.")

B. The Failure of Rupp's Speech to Fit the Most Familiar Stereotype of Protected Employee Speech Was No Reason for the Tenth Circuit to Subordinate its Importance.

In according Rupp's speech relatively little weight in the *Pickering* balancing, the Tenth Circuit found that "Mr. Rupp's continued cooperation with the FBI did not implicate the same level of public concern as the speech of employees who expose official wrongdoing, or who participate in protected political activity." App. A12. The Tenth Circuit had emphasized that "[t]he FBI's investigation of Mr. Tobiason had nothing to do with Mr. Phillips, or with wrongdoing at the FDP." *Id.*[3]

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[3] To the extent that the Tenth Circuit undervalued Rupp's speech because it was not made "to the public at large," that court disregarded a clear line of decisions of this Court protecting private speech. App. A12. This Court has repeatedly rejected the notion that speech must be publically expressed in order to be protected by the First Amendment. *See*

The extraordinary situation in which Mr. Rupp found himself after his communications with Tobiason does set him apart from typical public-employee plaintiffs. But that difference should not have caused the Tenth Circuit to give relatively *less* value to Rupp's speech. The Fourth Circuit put it best when it refused to "read the *Pickering, Givhan* and *Connick* Courts' emphasis on the importance attached to speech on matters involving public affairs and the operations of government as implying that employee speech on other matters lying within the first amendment's general protection should be accorded little weight in the public employee speech balancing process." *Berger v. Battaglia,* 779 F.2d 992, 999-1000 (4th Cir. 1985).

The Tenth Circuit repeatedly diminished the importance of Rupp's speech because it did not involve complaints of official wrongdoing. App. A12-A13. In so doing, the Tenth Circuit misunderstood the reason *why* whistleblowing regarding official misconduct is valued highly by this Court. Whistleblowing regarding official misconduct is especially valued *because the public has a significant interest in safeguarding such speech.* See *Pickering,* 391 U.S. at 571 (finding that plaintiff's speech "reflects rather a difference of opinion . . . that clearly concerns an issue of general public interest"). If there is a public interest in safeguarding speech when the subject of the whistleblowing is a school board that spends too much money on sports and not enough on cafeterias, *Pickering,* 391 U.S. at 577, no less of a public interest exists in safeguarding whistleblowing about someone

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Gihvan v. Western Line Consolidated School District, 439 U.S. 410, 415-16 (1979), (neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."); *Connick,* 461 U.S. at 146 (explicitly reaffirming the holding in *Gihvan); Rankin v. McPherson,* 483 U.S. 378, 378-87 n. 11 (1987) ("The private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern").

claiming that "the Oklahoma City bombing would be nothing compared to what he was prepared to do." App. A2.

C. The Tenth Circuit Created a Conflict with This Court's Decision in *National Treasury Employees Union* and Decisions of at Least One Other Circuit.

The Respondent's effort to suppress Rupp's speech originated with a view that Rupp's speech constituted a conflict of interest. That was the reason Rupp was given when he was allegedly ordered to cease all involvement with the FBI's investigation. Had there not been this fear of a conflict of interest, there would have been no order, and thus no insubordination, and thus no supposed "loss of faith" in Rupp's trustworthiness as an investigator.

This Court and the Fifth Circuit have rejected the notion that *Pickering* allows categorical prohibitions on speech that might conflict with the interests of the employer. *See, e.g., United States v. National Treasury Employees Union,* 513 U.S. 454, 457 (1995) (striking down portions of the Ethics Reform Act of 1989); *Hoover v. Morales,* 164 F.3d 221, 226 (5th Cir. 1998) (striking down Texas rule and law aimed at conflicts of interest). *See also In re Primus,* 436 U.S. 412, 437-38 (1978). The conflict that the Tenth Circuit created on this serious and fundamental issue is best resolved by this Court.

Governments often try, and fail, to suppress speech out of fear that it would create a real or perceived conflict of interest. That is no surprise, because government agencies routinely have interests that diverge from the interests of their employees. As the Fifth Circuit has recognized, if a conflict of interest were enough to justify suppression of their speech under *Pickering*, little speech would survive. *See Hoover v. Morales,* 164 F.3d 221, 226 (5th Cir. 1998).

In *Hoover*, the Texas Legislature had determined that an "inherent conflict of interest" would exist whenever a state employee was retained by a private party for litigation against

the state, and thus prohibited state funds from being used to compensate these faculty members. *Id.* at 222-23. The Fifth Circuit rejected Texas's efforts to justify them based on the state's supposed "interest in preventing such conflicts of interest:"

> Whatever else we might say about that "justification," the State's amorphous interest in protecting its interests is not the sort which may outweigh the free speech rights of state employees under *Pickering*. *The notion that the State may silence the testimony of state employees simply because that testimony is contrary to the interests of the State in litigation or otherwise, is antithetical to the protection extended by the First Amendment.* The scope of state interests which may outweigh the freespeech rights of state employees is much narrower than that. Indeed, the only state interest acknowledged by *Pickering* and its progeny, which may outweigh the right of state employees to speak on matters of public concern, is the State's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees."

Hoover, 164 F.3d at 226 (quoting *Pickering*, 391 U.S. at 568)(emphasis added).

The Tenth Circuit's approach in the present case is also at odds with this Court's most recent application of *Pickering*. In *National Treasury Employees Union*, this Court struck down those portions of the Ethics Reform Act of 1989 that prohibited federal employees from accepting any compensation for making speeches or writing articles. 513 U.S. at 457. The speculation that the speech might threaten the government's interests was insufficient, because "[o]ur *Pickering* cases only permit the Government to take adverse action based on employee speech that has adverse *effects* on 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *National Treasury Employees Union*, 512 U.S.

at 467 n. 11 (quoting *Pickering*). It further noted that "when the Government defends a regulation on speech as a means to redress past harms or to prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural. *Id* at 475 (quotation omitted). This Court asked for – and did not receive – "evidence of misconduct related to honoraria in the vast rank and file of federal employees" to whom the ban applied. *National Treasury Employees Union* at 472.

In this case, the FPD claimed that Rupp's cooperation would become generally known and would then discourage other clients of the office from speaking candidly to their court-appointed counsel and members of their staff. Yet it offered only conjecture to support its view. More was required by this Court's decisions. "As Justice Brandeis reminded us, a 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms." *National Treasury Employees Union,* 513 U.S. at 475 (citing *Whitney v. California,* 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

There was no evidence that it would be misconduct for an investigator for a public defender's office to cooperate with the FBI in this setting. Tobiason was not a client of Phillips' office. Rupp was not acting from information he obtained in his capacity as an investigator for Phillips' office. His contact did not concern any cases or clients that were represented by Federal Public Defenders. He never discussed or was questioned about any pending or closed cases that the FBI might have against a client of the Phillips' office. The sole subject of the communications concerned a resident of another state and the terroristic threats he made against the public and the government. App. I6.

There is no "conflict of interest" rule or law that precludes citizens from attempting to prevent crimes from taking place because they are employed to assist the defense of others accused of different crimes. Precluding the

appearance of a conflict of interest through suppression fails to serve the one employer interest recognized under *Pickering*– "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *National Treasury Employees Union*, 512 U.S. at 467 n. 11 (quoting *Pickering*).

D. Because Phillips' Ban on Protected Expressive Activity was Unconstitutionally Overbroad, Rupp's Failure to Have Complied With it Cannot Tip the *Pickering* Balance Against Him.

Phillips attempted to demonstrate that Rupp's continued cooperation with the FBI resulted in an actual disruption of the workplace, by relying upon the testimony of supervising staff who believed they could no longer trust Rupp. The lack of trust, Phillips contended, arose from his failure to have followed Phillips' alleged ban on any further involvement with the FBI's investigation of Tobiason.

For reasons set forth above, Phillips' ban on further involvement or cooperation with the FBI was unconstitutional because the interests in safeguarding this speech were not outweighed by the interest of Phillips, as an employer, in promoting the efficiency of the public services it performs through its employees. Insubordination arising from a failure to follow an unconstitutionally broad order does not tip the *Pickering* balance in the opposite direction. *See, e.g., Myers v. Hasara*, 226 F.3d 821, 829 (7th Cir. 2000); *Connor v. Reinhard*, 847 F.2d 384, 389-90 (7th Cir. 1988); *O'Brien v. Town of Caledonia*, 748 F.2d 403, 406-07 (7th Cir. 1984). Otherwise, an order or rule forbidding protected expressive activity could place employees between the "rock" of compliant silence and the "hard place" of unprotected insubordination.

II. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE TENTH CIRCUIT AND OTHER CIRCUITS ON THE QUESTION OF WHETHER A COURT APPLYING THE *PICKERING* TEST SHOULD RESOLVE FACTUAL DISPUTES ON WHICH THE OUTCOME OF THE TEST DEPENDS, AND DO SO WITHOUT A TRIAL.

This case presents a second question that trial and appellate courts are frequently required to address, and on which the U.S. Courts of Appeals are divided: whether a district judge may resolve genuine issues of material fact on which the outcome of the *Pickering* balancing turns, at the summary judgment stage, without the benefit of a trial.

Because the application of the *Pickering* test determines the meaning of the First Amendment, this Court has held that "the inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n. 7, 150 n. 10; *See also Waters v. Churchill*, 511 U.S. 661, 668 (1994) (plurality). At the same time, however, this Court has recognized that an entitlement to First Amendment protection in a particular context can turn on credibility determinations and other fact-based inquiries that are best made at trial. *See, e.g., Turner Broadcasting Corp.*, 512 U.S. at 668 (finding that First Amendment protection for cable programming decisions affected by must-carry rules should not have been resolved on summary judgment, "[b]ecause of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented"); *Harte-Hanks Communications, Inc., v. Connaughton*, 491 U.S. 657, 688 (1989). More generally, this Court has "consistently declined" various "invitations" to revise established rules of civil procedure, even when such revisions would give full effect to substantive claims or defenses. *See Crawford-El v. Britton*, 523 U.S. 574, 595 (1998). Thus, this Court has never created an exception for

First Amendment cases to the requirements of Rule 56 of the Federal Rules of Civil Procedure. *See Turner Broadcasting Corp.*, 512 U.S. at 668; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Non-movants in First Amendment cases are equally entitled to the benefit of all reasonable inferences. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 598 (1972).

Most U.S. Courts of Appeals have interpreted these decisions in a manner that has often prevented courts from determining–prior to trial–whether speech was entitled to First Amendment protection under *Pickering*. *See, e.g., Gorman-Bakos v. Cornell Cooperative Extension of Schenectady County*, 252 F.3d 545, 557-58 (2nd Cir. 2001) ("It would be improper at this stage for the district court–or this court on appeal – to resolve the factual disputes between the parties, or to decide the proper balance between the parties' [*Pickering*] interests"); *Domina v. Van Pelt*, 235 F.3d 1091, 1098 (8th Cir. 2000); *Myers v. Hasara*, 226 F.3d 821, 827-28 (7th Cir. 2000); *Kennedy v. Tangipahoa Parish Library Board of Control*, 224 F.3d 359, 377 (5th Cir. 2000); *Johnson v. University of Cincinnati*, 215 F.3d 561, 585 (6th Cir. 2000); *Johnson v. Multnomah County, Oregon*, 48 F.3d 420, 426 (9th Cir. 1995).[4] These courts acknowledge that this Court has reserved for judges the responsibility of interpreting and applying the law to "the facts." However, they also recognize that in so doing this Court has not empowered judges to decide, prior to trial, which version of properly disputed facts to believe.

Other courts, however–including the panel of the Tenth Circuit that affirmed summary judgment below–have resolved genuine issues of material fact when applying the *Pickering*

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[4] Indeed, the Eighth Circuit has promulgated a pattern jury instruction and special interrogatory to apply in determining whether speech is protected by the First Amendment under *Pickering*. See Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, Sec. 5.71A at 144 (1999 ed)

test. For example, a panel of the Third Circuit has defined the role of judges in this setting much more broadly: "Normally, [the Pickering] test would be an issue of fact and would remain in the hands of the fact finder. But where the presence of factual disputes would normally preclude the court from ruling as a matter of law, Supreme Court precedent requires the trial court to do so."

Green v. Philadelphia Housing Authority, 105 F.3d 882, 887 (3rd Cir. 1997) (emphasis added).

The record below gave rise to several genuine issues of material fact that the Tenth Circuit panel chose to resolve in the *movant's* favor. First, the Tenth Circuit resolved whether Rupp's speech was actually disruptive by focusing exclusively on evidence favorable to the movant, and in disregard of evidence offered by the non-movant. In explaining its holding that "Mr. Phillips' interests in regulating Mr. Rupp's speech were substantial," the Tenth Circuit found that "Mr. Phillips *has introduced evidence* that Mr. Rupp's behavior created a disruption in the FPD office and disturbed its ability to carry out its mission." App. A13 (emphasis added). Under fundamental principles of civil procedure embodied in Rule 56, the availability of summary judgment does not turn on whether a *movant* can introduce evidence; it turns on whether the non-movant cannot. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 251. In this case, this error was critical, because the record contained sworn testimony by Rupp's immediate supervisor that "any actual disruption that I can think of was pretty minor." App. A10. The Tenth Circuit's apparent belief that it may decide which evidence to believe on the subject of "actual disruption" is fundamentally at odds with recent holdings in at least three other Circuits. *See, e. g., Gorman-Bakos,* 252 F.3d at 557; *Domina,* 235 F.3d at 1098; *Johnson,* 215 F.2d at 585 (all holding, in the last eighteen months, that the question of actual disruption must be resolved at trial).

Second, the Tenth Circuit disregarded an important conflict in the record when it found that Rupp "deliberately

ignored the instructions of his supervisors." App. A14. The deposition testimony in the record created a swearing contest regarding exactly what the allegedly insubordinate employee had been instructed not to do. Under oath, the two parties to that conversation described the order in fundamentally different ways; the Tenth Circuit recognized as much in its ruling. App. A3. The difference in the outcome of that swearing contest is "material" to the question of whether Rupp was insubordinate.

The Tenth Circuit's approach to this question is fundamentally in conflict with the approaches taken by the D.C. Circuit and the Seventh Circuit to precisely the same issue. *See Hubbard v. U.S. E.P.A. Adm'r,* 809 F.2d 1, 12, (D.C. Cir. 1986) *aff'd in rel. part, Spagnola v. Mathis,* 659 F.2d 223 (D.C. Cir. 1988) (en banc); *Myers v. Hasara,* 226 F.3d at 827.

Third, the Tenth Circuit did not give the non-movant the benefit of reasonable inferences regarding the importance to the FBI of his continued cooperation. When Phillips' counsel asked Agent Vick whether Rupp's cooperation was "vital to the prosecution of Mr. Tobiason," and Vick could answer neither"yes" nor "no," Phillips' counsel then attempted to withdraw the question before Vick could elaborate on the reasons for his hesitancy. See *supra* p. 21, n. 3. Vick's response to that question gives rise to an inference that silencing Rupp would cause significant harm to the FBI's ability to achieve its objectives.

In the eyes of the Tenth Circuit, this was a highly material subject; it noted that "if there had been some indication that Mr. Rupp's continued assistance with the investigation was imperative, *our balancing assessment could well be different.*" App. A13, n. 4 (emphasis added). In acting as a fact-finder on this point, prior to any trial, the Tenth Circuit acted in conflict with the law as set forth by this Court and most other U.S. Courts of Appeals.

CONCLUSION

This Court long ago recognized that citizen cooperation is inherently necessary to the administration of justice. *See Wood v. Georgia*, 370 U.S. 375, 391 (1962) ("The administration of the law is not the problem of the judge or the prosecuting attorney alone, *but necessitates the active cooperation of an enlightened public.*") (emphasis added). If the "active cooperation" of public employees with the administration of law may be punished and restrained except where the speech is "new" and the speaker "irreplaceable" to an investigation of "official wrongdoing," highly valuable speech will be deterred.

Additionally, the Tenth Circuit's apparent willingness to resolve genuine issues of material fact, prior to trial, upon which the *Pickering* balancing turns, exacerbates an existing conflict between the Courts of Appeals.

Accordingly, this Court should grant this Petition for Writ of Certiorari on one or both of the questions presented.

Respectfully submitted,

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Dated: November 4, 2001.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 99-3355

July 23, 2001

K. Daniel Rupp,

Plaintiff-Appellant,

v.

David J. Phillips,

Defendant-Appellee.

Before HENRY and MURPHY, Circuit JJ., and MILLS, District J.[1]

ORDER AND JUDGMENT.[2]

HENRY.

Daniel Rupp is a former employee of David Phillips, the Federal Public Defender ("FPD") in Wichita, Kansas. Mr. Rupp brought this *Bivens* action against Mr. Phillips, arguing that when Mr. Phillips terminated Mr. Rupps' employment at the Wichita FPD office, he violated Mr. Rupp's First Amendment rights. The district court granted summary judgment to Mr. Phillips. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm the judgment of the district court.

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[1] The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

[2] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

I. BACKGROUND

The Federal Public Defender represents indigent defendants in the federal courts. As FPD for the District of Kansas, Mr. Phillips supervises an office that employs individuals with several types of skills (for example, investigators and legal counsel), and handles a variety of federal cases ranging from parole violations to capital crimes. In December of 1994, Mr. Rupp was hired by the FPD's Wichita office as an investigator.

Mr. Rupp is an avid gun collector and frequently visits gun shows. Sometime during 1997, Mr. Rupp met a vendor named Timothy Tobiason at one of these shows. Mr. Tobiason was selling books that described how to manufacture biological and chemical weapons of mass destruction. After conversing with Mr. Tobiason, Mr. Rupp learned that Mr. Tobiason "was very disgruntled with regard to how he had been treated by the government in business and in his personal life." Aplt's App. at 433.

On June 6, 1998, Mr. Rupp attended another weekend gun show, where he again encountered Mr. Tobiason. Mr. Tobiason was now selling a book entitled "Advanced Biological Weapons Design and Manufacture," which contained instructions on how to culture and spread deadly diseases, as well as language threatening the government. *Id.* at 432.36. Mr. Rupp talked with Mr. Tobiason, and became convinced that not only had Mr. Tobiason actually begun to manufacture chemical weapons, but that he had plans to use them against agents of the government. According to Mr. Rupp, Mr. Tobiason stated that the damage caused by "the Oklahoma City bombing would be nothing" compared to what he was prepared to do. *Id.* at 437-38.

Mr. Rupp feared that the commission of these crimes was imminent, so on the next business day (June 8, 1998), he contacted federal law enforcement agents to report Mr. Tobiason. Mr. Rupp described Mr. Tobiason's activities and threats to Paul Vick, an FBI agent. Mr. Rupp and Agent Vick

then discussed the possibility of Rupp being "a cooperating witness," in which case Mr. Rupp might "volunteer to be wired" to record future conversations with Mr. Tobiason. *Id.* at 237.

Mr. Rupp then contacted Mr. Phillips, and told him about his encounter with Mr. Tobiason and his conversation with Agent Vick. According to Mr. Phillips, he commended Mr. Rupp for telling the FBI about Mr. Tobiason, but said Mr. Rupp should not be involved in any FBI investigation, and asked Mr. Rupp to contact Cindy McNorton, Mr. Rupp's supervisor. After Mr. Rupp told Ms. McNorton that he might "wear a wire" to tape Mr. Tobiason at an upcoming gun show, Ms. McNorton reported this to Mr. Phillips. *Id.* at 208. Mr. Phillips instructed Ms. McNorton to tell Mr. Rupp that because of conflicts of interest between FPD and FBI, "we can't have him working undercover for the FBI." *Id.* at 209. Ms. McNorton stated that Mr. Rupp then told her that "he would not sneak around her." *Id.* at 311.

Mr. Rupp subsequently went back to Agent Vick to ask what the FBI would want from him. According to Mr. Rupp, Agent Vick stated that it would be illegal for the FPD to terminate him for cooperating with the FBI. Mr. Rupp then asked Ms. McNorton what he could do for the FBI. According to Mr. Rupp, Ms. McNorton told him he could not be a witness. However, Mr. Phillips claims Ms. McNorton's response was much stronger; in his account, she told Mr. Rupp that he was "out" of the Mr. Tobiason investigation, that "there was nothing more that he could do on that case," and that even if he was contacted again by Mr. Tobiason, he should discuss the situation with the FPD before resuming contact with the FBI. *Id.* at 213.

Throughout that summer, without informing his employer, Mr. Rupp continued to keep in touch with Agent Vick. At Agent Vick's request, on June 16, 1998, he wrote a letter to Mr. Tobiason, inquiring whether he would be at a Wichita gun show in September. Near the end of that month, Mr. Rupp received a response from Mr. Tobiason, indicating

that Mr. Tobiason would be at that September show. Mr. Rupp turned that letter over to Agent Vick, who asked him to attend the show and assess Mr. Tobiason's "state of mind." *Id.* at 119.

In September, Mr. Rupp mentioned to an FPD co-worker that he would be attending the upcoming gun show in order to "do a favor for the FBI." *Id.* at 439. The co-worker suggested that Mr. Rupp contact Ms. McNorton and tell her about this plan. Mr. Rupp did so on September 10. Ms McNorton then conferred with Mr. Phillips and Charles Dedmon, an FPD attorney from Topeka. According to Mr. Phillips, the three of them decided the FPD could no longer trust Mr. Rupp, as he had in their view chosen to be involved in the investigation after he had been instructed not to be, and after he said he would not be. They also decided that his actions "disrupted" the operation of the FPD office. *Id.* at 335. As a result, Mr. Phillips terminated Mr. Rupp's employment. The parties agree that following his termination, Mr. Rupp subsequently exhausted all the administrative remedies that were available to him, but was unable to regain his job. He then filed this suit against Mr. Phillips.

The district court granted summary judgment in favor of Mr. Phillips. It assumed for the sake of the summary judgment motion that a *Bivens* action could be maintained against Mr. Phillips, and then considered the question of whether Mr. Phillips had violated Mr. Rupp's First Amendment rights. Citing *Cragg v. City of Osawatomie, Kan.*, 143 F.3d 1343 (10th Cir. 1998), the court stated that that question was governed by the four part test set forth in *Pickering v. Board of Educ.* 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983) (the *Pickering/Connick* balancing test").

The court found that Mr. Rupp's initial contact with the FBI, in which he reported his concerns regarding Mr. Tobiason, "clearly [involved] matters of public concern and an expression of free speech." Aplt's App. at 530 (Dist. Ct. Order, dated Oct. 19, 1999). However, it continued, Mr.

Rupp was not reprimanded or terminated for this initial contact. Rather, he was praised for his efforts, but advised that he could no longer continue assisting the FBI in its investigation and work with the FPD's office due to potential conflicts of interest, office disruption, and loss of credibility. *Id.* at 530-31. The court stated that Mr. Rupp "agreed to cease his involvement," but in spite of this agreement, "continued to assist the FBI." *Id.* at 531.

The court then found that Mr. Rupp's continued involvement in the investigation was "unnecessary for the investigation" and thus "not, in this Court's opinion, an expression of free speech protected by the First Amendment." *Id.* In the alternative, even if Mr. Rupp's involvement had been an activity protected by the First Amendment, the court found that "the FPD's interest in restricting [Mr. Rupp's] expression outweighs his constitutional rights." *Id.* at 532. Applying the *Pickering/Connick* balancing test, it found that Mr. Phillips had advanced "substantial evidence of disruption," and shown that his decision to terminate Mr. Rupp "was not based on mere speculation, but on evidentiary support including his personal opinion and loss of trust, the opinion of [Mr. Rupp's] immediate supervisor, and an attorney within the office." *Id.* at 535-36.

The court concluded that Mr. Rupp's actions "disobeying specific instructions" and "concealing his involvement until he knew his assistance would be discovered," as well as "the nature of his position within the FPD and the knowledge of Mr. Tobiason concerning [Mr. Rupp's] employment, render [Mr. Phillips's] interest much greater than those of [Mr. Rupp] in continuing his role in the investigation." *Id.* at 537. It also ruled that even if Mr. Phillips had committed a constitutional violation, he enjoyed qualified immunity for his actions.

II. DISCUSSION

We review de novo the district court's grant of summary judgment, viewing the record in the light most favorable to

Mr. Rupp, as the party opposing summary judgment. *See* *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th. Cir. 1998). "In cases involving the First Amendment, the de novo standard is appropriate ... for the further reason that ... an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Horstkoetter v. Dep't of Public Safety*, 159 F.3d 1265, 1270 (10th Cir. 1998) (internal quotation marks omitted). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

On appeal, Mr. Rupp asserts three errors by the district court. First, he argues that the court was incorrect when it found that his continued contact with the FBI did not pertain to a matter of public concern, and thus was not protected by the First Amendment. Second, he argues that the district court's balancing of the parties' interests was mistaken, and that any disruption of FPD activities was outweighed by Mr. Rupp's First Amendment interests in cooperating with the FBI. Finally, Mr. Rupp contends that because Mr. Phillips' conduct violated clearly established law, the court should not have found Mr. Phillips qualifiedly immune from suit. We consider these arguments in turn.

A. Speech on a Matter of Public Concern

When acting as an employer, the government may constitutionally restrict the speech of its employees to a greater degree than when it acts in its general capacity as the sovereign. The Supreme Court has explained that:

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When [an employee] ... begins to do or say things that detract from the agency's effective

> operation, the government employer must have some power to restrain [him].

Waters v. Churchill, 511 U.S. 661, 674-75 (1994).

However, this power to restrain government employees' First Amendment rights is not absolute. To determine whether Mr. Phillips's actions have infringed upon Mr. Rupp's freedom of speech and expression, we apply the *Pickering/Connick* test. *See* *Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1999).

The test is as follows: (1) Does the speech in question involve a matter of public concern? If so, (2) we must weigh the employee's interest in the expression against the government employer's interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace. These first two parts of the test are questions of law. If the employee prevails on both these questions, we proceed to the remaining two steps, which are questions of fact. In part (3), the employee must show the speech was a substantial factor driving the challenged governmental action. If the employee succeeds, (4) the employer, in order to prevail, must in turn show that it would have taken the same action against the employee even in the absence of the protected speech. *Id.*; *see also* *Horstkoetter*, 159 F.3d at 1271.

In the first part of the test, we must inquire whether Mr. Rupp's actions constituted speech involving a matter of public concern. We have held that "[m]atters of public concern are those of interest to the community, whether for social, political, or other reasons." *Lytle v. City of Haysville, Kan.*, 138 F.3d 857, 863 (10th Cir. 1998) (citing *Connick*, 461 U.S. at 145-49). It is absolutely clear, as both parties agree, that Mr. Rupp's initial contact with the FBI was speech that involved a matter of public concern, and was protected by the First Amendment. The district court correctly found in favor of Mr. Rupp on this issue. Aplt's App. at 530.

However, the district court also found that Mr. Rupp's subsequent involvement with the FBI was outside the protection of the First Amendment. Citing *Curtis v. Oklahoma CityPub. Schools Bd. of Educ.*, 147 F.3d 1200, 1212 (10th Cir. 1998), Mr. Rupp challenges this finding. In *Curtis*, we noted that "'[i]n deciding how to classify particular speech, courts focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose.'" *Id.* (quoting *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996)). Mr. Rupp argues that his continued cooperation with the FBI "was clearly a matter of grave public concern," due to the seriousness of the crimes threatened by Mr. Tobiason, and was not motivated by personal grievances. Aplt's Br. at 29. Mr. Rupp contends that at the time Agent Vick asked him to write a letter to Mr. Tobiason, he understood Agent Vick to have implied that Mr. Rupp's continued involvement was necessary to the investigation. *Id.* at 30. This, Mr. Rupp proposes, demonstrates both that the FBI deemed the investigation to be a matter of public concern, and that he was not acting for merely personal reasons.

In contrast, Mr. Phillips urges that although Mr. Rupp's initial contact with the FBI may be called speech, his further cooperation may not, because he was neither "expressing his views" nor "commenting upon a matter of public concern." Aple's Br. at 22. In support of this contention, Mr. Phillips cites *Koch v. City of Hutchinson*, 847 F.2d 1436, 1447 (10th Cir. 1988), for the proposition that Mr. Rupp's cooperation was not speech relating to a matter of public concern because it was not intended to inform the public at large. In essence, Mr. Phillips would have us hold that, although initially informing a law enforcement agency about a possible crime may be protected speech, subsequent cooperation with the agency is not necessarily protected.

Mr. Rupp's conduct does not readily compare to that of employees in our previous *Pickering/Connick* cases. Where

we have held that speech did not involve a matter of public concern, that speech has essentially involved matters that were not of general public interest because they related only to the internal operations of an employee's workplace. *See, e.g., Koch*, 847 F.2d at 1447-49 (fire investigation report was routine work product that was not intended to inform public); *see also Connick*, 461 U.S. at 146-47 (holding that employee speech "upon matters only of personal interest" is unprotected). Mr. Rupp's continued cooperation with the FBI cannot be characterized as having only been related to personal grievances or the routine internal operations of the FPD. But where we have held that employees' speech did involve a matter of public concern, employees generally spoke in order to inform the public about some matter of public interest involving the workplace. *See, e.g., Curtis*, 147 F.3d at 1206, 1211-12 (public school employee, whose job was to help public schools achieve "equity," spoke on matter of public concern in discussing whether school district was meeting that goal); *Gardetto*, 100 F. 3d at 812-13 (speech of public college employee discussing matters including questionable academic credentials of college president involved public concern). Mr. Rupp's continued cooperation with the FBI did not reveal anything to the public about the FPD.[3]

However, as the district court correctly noted, any ambiguity as to the status of Mr. Rupp's actions under the first part of the *Pickering/Connick* test is of limited significance, because there is no uncertainty regarding the legal resolution of the second part of that test. As such, we will now turn to that second part. *See Horstkoetter*, 159 F.3d at 1272-73 (holding that "even assuming [a plaintiff] can survive the first hurdle," he must also overcome the second before he can prevail).

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[3] There is also some question as to whether Mr. Rupp's later actions may be characterized as "speech." *See Horstkoetter*, 159 F.3d at 1272 n. 3.

B. Balancing the interests of Mr. Rupp and the FPD

With regard to the second part of the *Pickering/Connick* test, the district court found that the interests of the FPD in regulating Mr. Rupp's speech outweighed Mr. Rupp's interest in that speech. Aplt's App. at 530. Mr. Rupp challenges this finding on several grounds. He states that his speech was a matter of serious, weighty public concern; that as a consequence, Mr. Phillips should be required to make a "stronger showing" of the necessity of a speech restriction; and that Mr. Phillips has failed to make this showing, as Mr. Rupp's speech "caused no actual disruption to client services at the public defender's office." Aplt's Br. at 37, 39.

In order to establish the seriousness of the public concern with his speech, Mr. Rupp essentially equates the object of his speech with the object of the FBI investigation. He states that "[i]t is hard to imagine a more substantial public concern than the one in this case," namely that of saving the lives potentially threatened by Mr. Tobiason, and that his speech "should be entitled to greater weight because he was acting at the request of the FBI trying to save lives." Aplt's Br. at 37-38. Additionally, if his speech involved matters of public concern, Mr. Rupp argues that under *Cragg v. City of Osawatomie, Kan.*, 143 F.3d 1343 (10th Cir. 1998), we should require Mr. Phillips to make a "stronger showing" of the necessity of infringing upon Mr. Rupp's speech rights. *Id.* at 1346 (quoting *Connick*, 461 U.S. at 152).

Mr. Rupp also contends that his employer's interests were not sufficiently weighty to justify his termination. Citing testimony by Mr. Phillips and Ms. McNorton, he argues that his cooperation with the FBI caused no real disruption in the FPD's office. For instance, at one point in Ms. McNorton's deposition, she stated that "[a]ny actual disruption that I can think of was pretty minor." Aplt's App. at 224; *see also* Aplt's App. at 257-67 (deposition testimony of Mr. Phillips). In light of this testimony, Mr. Rupp argues that under *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), Mr. Phillips's concerns were "purely speculative," and

thus insufficient to outweigh Mr. Rupp's interest in his speech. *Id.* at 862 (internal quotation marks omitted).

In response, Mr. Phillips proposes that not only was the FPD not required "to wait for speech actually to disrupt core operations before taking action," but that contrary to Mr. Rupp's statements, it had shown actual disruption. Aple's Br. at 26 (quoting *Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995)). For example, Mr. Phillips cites the deposition of Charles Dedmon, who stated that the FPD's office could not trust Mr. Rupp to perform his job function as a result of his contacts with the FBI; apparently, during the time Mr. Rupp was interacting with the Wichita FBI office regarding Mr. Tobiason, the Wichita FBI office and the Wichita FPD office were working on opposite sides of a capital case. Aplt's App. at 335; *see also* Aplt's App. at 293-94 (deposition of Cyd Gilman).

Mr. Phillips further contends that Mr. Rupp was not terminated merely for speaking with the FBI, but for continuing to cooperate with the FBI after he had indicated to the FPD that he would not do so. In Mr. Phillips's view, this increases the weight we should give to the FPD's interest in regulating Mr. Rupp's speech. He also argues that Mr. Rupp's continued FBI cooperation was not weighty, i.e. that it was of limited public importance, because the FBI was capable of carrying on the investigation without him.

After reviewing the record, we hold that under the *Pickering/Connick* balancing test, the interests of the FPD outweigh those of Mr. Rupp. We cannot agree that Mr. Rupp's continued cooperation with the FBI should be characterized as involving the most substantial of public concerns. Although the ultimate object of the FBI's investigation was important, the *Pickering* test asks us to balance not the general public concern with criminal investigations, but the specific public concern with Mr. Rupp's continued participation in this particular investigation.

The FBI's investigation of Mr. Tobiason had nothing to do with Mr. Phillips, or with wrongdoing at the FPD. While it is true that in *Moore*, we held that "[w]histleblowing, of course, is not the only form of public employee speech that is protected," we added that the government's relative burden "in justifying a particular discharge varies depending upon the nature of the employee's expression." Moore, 57 F.3d at 933 (quoting Connick, 461 U.S. at 150) (internal quotation marks omitted). In *Moore*, the discharged employee "did not reveal any new information to the public about the operation of the police department" that employed him. *Id.* We therefore held that the employee's speech was "less important and less valuable to the public than is the speech often at issue in public employee speech cases." *Id.; cf.* Cragg, 143 F.3d 1343, 1346-47 (10th Cir. 1998) (participation in public political discourse "at the core" of speech protected by the First Amendment).

We conclude that, as with the speech at issue in *Moore*, Mr. Rupp's continued cooperation with the FBI did not implicate the same level of public concern as the speech of employees who expose official wrongdoing, or who participate in protected political activity. Mr. Rupp's *initial* contact with the FBI did reveal new information to the public, and so may have been entitled to greater weight under the balancing test. But once Mr. Rupp had tipped the FBI, it was certainly capable of carrying out an investigation of Mr. Tobiason with or without Mr. Rupp's help. Indeed, Agent Vick testified to this fact. *See* Aplt's App. at 247. Thus, even if we consider Mr. Rupp's continued speech to the FBI to be the equivalent of speaking to the public at large, it cannot be deemed either as new or as irreplaceable as the most protected types of speech. For the purpose of *Pickering/Connick* balancing, Mr. Rupp's choice to continue his undercover role in the Mr. Tobiason investigation did not imbue his speech with the utmost constitutional protection. As a result, Mr. Phillips's burden is correspondingly less weighty.

Objecting to this potential conclusion, Mr. Rupp cites *Robinson v. Balog*, 160 F.3d 183 (4th Cir. 1998), for the proposition that there will be "serious implications" if we hold that public employees may be fired "for assisting a ... criminal investigation." *Id.* at 188. But the facts of that case are distinguishable. In *Balog*, the plaintiffs' speech sought "to bring to light 'actual or potential wrongdoing or breach of public trust' on the part of government employees." *Id.* (quoting *Connick*, 461 U.S. at 148). The employees who perpetrated the wrongdoing were the plaintiffs' supervisors, and the supervisors disciplined the plaintiffs for trying to correct the wrongdoing. Because this was not Mr. Rupp's situation, a holding that his interests were of less than maximal weight in no way calls into question the interests of employees in a case such as *Balog*.[4]

We also hold that Mr. Phillips's interests in regulating Mr. Rupp's speech were substantial, and outweighed Mr. Rupp's interest in his speech. As noted above, contrary to Mr. Rupp's assertion, Mr. Phillips has introduced evidence that Mr. Rupp's behavior created a disruption in the FPD office and disturbed its ability to carry out its mission. *See* Aplt's App. at 293-94, 335. This is consistent with the Supreme Court's rule that an employer's decision should be based on a reasonable interpretation of the evidence available to it. *See Waters*, 511 U.S. at 676-77. Moreover, we agree with Mr. Phillips that an agency such as the FPD, which in a sense works against law enforcement agencies when it works on behalf of its clients, may legitimately have heightened concerns about its employees' involvement with law

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[4] Mr. Rupp also contends that this holding will send "absolutely the wrong signal" to individuals contemplating future cooperation with the FBI, and possibly endanger lives. Aplt's Br. at 49. We emphasize again that nothing in today's decision discourages, much less prohibits, Mr. Rupp's original contact with the FBI. As such, it is unlikely to cause significant avoidance and error costs. In addition, if there had been some indication that Mr. Rupp's continued assistance with the investigation was imperative, our balancing assessment could well be different.

enforcement. *See* Rankin v. McPherson, 483 U.S. 378, 390 (1987) ("The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.").

Finally, Mr. Rupp's own statements reveal that he deliberately ignored the instructions of his supervisors. In his deposition, Mr. Rupp stated that although he had been told he would be fired if he continued to cooperate with the FBI, he did so anyway, because "knew" it "just had to be" illegal for the FPD to fire him on this basis. Mr. Rupp did not consult an attorney to verify this opinion. Aplt's App. at 114-15.

As we stated in *Moore*, "although government employers do not have a blanket license to retaliate against employees based on unfounded fears or speculation about the harmful effects of employee speech," Mr. Phillips has gone beyond speculation and has "identified a reasonable basis" for his actions. Moore, 57 F.3d at 935. The disturbance caused by Mr. Rupp's actions might have been outweighed if his speech had been of the utmost First Amendment importance. However, because it was not, we hold that the second part of the *Pickering/Connick* test clearly tips in favor of Mr. Phillips. As a result, we need not reach additional issues under that test.

C. Mr. Phillips's Immunity

Mr. Rupp also argues that the district court was incorrect in finding that Mr. Phillips enjoyed qualified immunity with respect to the termination. Because we have held that there was no constitutional violation, we have no reason to consider this issue. *See* Moore, 57 F.3d at 935-36 (concluding that, where the plaintiff failed to demonstrate that the defendant violated his First Amendment rights, the court need not reach the issue of qualified immunity).

III. CONCLUSION

For the reasons set forth above, we AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plaintiff,

v.

DAVID J. PHILLIPS, in his personal capacity,

Defendant.

CIV-99-2101-WEA

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ORDER

Before the Court are defendant's motion for summary judgment and plaintiff's response. Defendant seeks judgment as a matter of law that a *Bivens* action is inappropriate, and alternatively that defendant did not violate plaintiff's First Amendment rights by terminating his employment for assisting the Federal Bureau of Investigation ("FBI") in an investigation. Plaintiff argues that material questions of fact remain concerning the violation of his First Amendment rights. Based on the materials and pleadings before the Court, the Court grants defendant's motion for summary judgment.

Undisputed Facts

The District of Kansas Federal Public Defender's Office ("FPD") hired plaintiff in December 1994 as an investigator. Plaintiff's Complaint. Plaintiff's job responsibilities included investigating allegations of criminal activity by the

individuals defended by the FPD. Defendant's Motion for Summary Judgment, Ex. E, pp. 110-111.

Plaintiff is an avid gun collector and frequented area gun shows. Plaintiff's Complaint. He met Timothy Tobiason sometime prior to the summer of 1998. *Id.* Mr. Tobiason was a vendor who sold materials concerning the design and manufacture of biological and chemical weapons. *Id.* On June 6, 1998, plaintiff met Mr. Tobiason at a gun show in Wichita, Kansas. Mr. Tobiason made statements which indicated to plaintiff that Mr. Tobiason had created nerve agents in small quantities. *Id.* Defendant's Motion for Summary Judgment, Ex. E, pp. 43-44. Mr. Tobiason exhibited a hostility towards federal agents. Defendant's Motion for Summary Judgment, Ex. D, pp. 10-11.

On June 8, 1998, plaintiff contacted Dennis Laughrey of the Alcohol, Tobacco & Firearms Bureau regarding Mr. Tobiason. *Id.* at Ex. A, pp. 118. Mr. Laughrey referred plaintiff to Agent Paul Vick with the FBI. *Id.* Plaintiff discussed various scenarios with Agent Vick regarding obtaining further information from Mr. Tobiason prior to speaking with his supervisors at the FPD. *Id.* at p. 172; Ex. E, pp. 43-45.

On June 9, 1998, Sharon Aldridge, an assistant paralegal with the FPD, called plaintiff's immediate supervisor, Cindy McNorton, and asked her if she had heard of plaintiff's involvement with the FBI. *Id.* at Ex. E, pp. 33-35. Ms. McNorton indicated that she had not. *Id.* Ms. Aldridge stated she attempted to persuade plaintiff to contact either Ms. McNorton, or Ms. McNorton's supervisor, David Phillips. *Id.*

After learning of plaintiff's involvement with the FBI, defendant commended plaintiff, and pursuant to defendant's instructions, Ms. McNorton told plaintiff he should refrain from entering into any further investigation of Mr. Tobiason.

Id. at Ex. A, pp. 115-116; Ex. E, pp. 37-38; Ex. F, pp. 10-11.[1] Defendant was concerned about plaintiff's involvement in the FBI investigation and discussed the potential conflict of interest and lack of confidence criminal defendant clients of the FPD would feel regarding an agent of the FPD's involvement with a law enforcement agency. *Id.* at Ex. E, pp. 39-40; Ex. F, p. 10. Ms. McNorton called plaintiff to discuss the situation. *Id.* at Ex. E, pp. 43-44. Plaintiff told Ms. McNorton that he would be attending a gun show in Wichita the following weekend and that he had discussed possible scenarios of obtaining further information from Mr. Tobiason with the FBI, including wearing a wire. *Id.* at p. 44. Ms. McNorton reported her conversation to defendant. *Id.* at Ex. E, pp. 48-49. Defendant again discussed the conflict of interest between the FPD and FBI in this situation with Ms. McNorton. *Id.* at Ex. F, p. 13. Defendant told Ms. McNorton to instruct plaintiff not to continue his involvement with the FBI on this matter. *Id.*

On June 9, 1998, plaintiff told Cyd Gilman, an attorney with the FPD, of his desire to work with the FBI on this investigation. *Id.* at Ex. G, p. 11. Ms. Gilman told plaintiff she thought it would be a conflict of interest, could destroy the FPD's credibility and plaintiff could possibly lose his job. *Id.* After plaintiff was terminated but during the pendency of

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[1] Plaintiff contends that defendant merely instructed him not to be a witness in the investigation. However, plaintiff testified in his deposition that Ms. McNorton told him he could lose his job if he continued to be involved in a substantive investigation of Mr. Tobiason. *Id.* at Ex. A, pp. 103-104. He also testified that Ms. McNorton told him he would lose his job if he had further contact with Mr. Tobiason, and that he could not be a witness. *Id.* at pp. 122, 127-129. Plaintiff admitted that he knew his contact with Mr. Tobiason could lead to his termination. *Id.* at 130-131, 139-141. Further, he indicated that he told Agent Vick that he could not be involved in a substantive manner and could not be a witness. *Id.* at p. 135. Plaintiff's denial of undisputed fact number 21, limiting Ms. McNorton's statement to prohibiting him from being a witness, is an unsuccessful attempt at creating a fact issue. Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986).

his appeal with defendant, Ms. Gilman indicated she no longer trusted plaintiff as an investigator in her cases. *Id.* at p. 31-32.[2]

Ms. McNorton told plaintiff that he could no longer work for the FPD and continue his investigation with the FBI. *Id.* at Ex. E, pp. 62-63. Plaintiff agreed not to continue with the investigation. *Id.* at Ex. J, Att. 3, p. 2. However, plaintiff continued to be involved in the investigation. *Id.* at Ex. A, pp. 134-136. Agent Vick of the FBI felt the investigation and prosecution of Mr. Tobiason could be finalized without plaintiff's assistance. *Id.* at Ex. D, p. 51. Plaintiff recognized his involvement was no longer necessary, but he wished to continue his involvement. *Id.* at Ex. E, p. 61.[3] Agent Vick instructed plaintiff to keep his continued assistance in the investigation confidential, including from his employer. *Id.* at Ex. A, pp. 129-130; Ex. D, pp. 34-35.

On September 9, 1998, plaintiff told Ms. Aldridge that he was going to do a favor for the FBI over the weekend. *Id.* at Ex. A, pp. 142-143. Ms. Aldridge advised plaintiff to contact Ms. McNorton prior to his meeting. On September 10, 1998, plaintiff informed Ms. McNorton that he had continued with the FBI investigation, and that the FBI wanted him to attend a gun show and assess Mr. Tobiason's state of mind. *Id.* Plaintiff informed Ms. McNorton that the had met with the FBI five or six times after he had been instructed not

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[2] Plaintiff disputes this fact citing page 5 of Ms. Gilman's deposition and stating that she trusted him to continue working on her cases until the end of his employment. However, page 5 of Ms. Gilman's deposition testimony does not reflect this fact. Rather, it indicates a general lack of confidence in plaintiff's abilities as an investigator.

[3] Although plaintiff denies undisputed fact number 37 citing p. 144 of his deposition, his testimony reveals that he does not remember making this statement to Ms. McNorton. Further, he admits the FBI felt his assistance was not necessary. Response, p. 4, number 28. Once again, the Court finds plaintiff has attempted unsuccessfully to create an issue of fact. Franks v. Nimmo, supra, n.1.

to be involved in the investigation. *Id.* at Ex. E, pp. 143-144.[4] Mr. Tobiason was aware plaintiff worked for the FPD. *Id.* at Ex. A, p. 142.

Ms. McNorton, defendant and an FPD attorney had a discussion concerning plaintiff's involvement with the FBI and his continued employment. Defendant terminated plaintiff as he could no longer be trusted. *Id.* at Ex. E, pp. 82-86, Ex. F, p. 23. Plaintiff appealed this decision, which defendant affirmed.

Standard of Review

Summary judgment is appropriate if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[A] motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact." *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204 (10th Cir. 1977). The movant bears the initial burden of demonstrating the absence of a material fact requiring judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it is essential to the proper disposition of the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

If the movant carries this initial burden, the nonmovant must then set forth "specific facts" outside the pleadings and admissible in evidence that would convince a rational trier of fact to find for the nonmovant. Fed. R. Civ. P. 56(e). Such evidence includes reference to affidavits, deposition transcripts, or specific exhibits. *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir.), *cert.*

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[4] Plaintiff denies undisputed fact number 37, citing p. 144 of his deposition. His testimony reveals he does not recall discussing the witness protection program with the FBI. His testimony does not contradict the remainder of undisputed fact number 37.

denied, 506 U.S. 1013 (1992). "The burden is not an onerous one for the nonmoving party in each case, but does not at any point shift from the nonmovant to the district court." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664 (10th Cir. 1998). Although the district court has the discretion to go beyond the referenced portions of the supporting material, it is not required to do so. *Id.* In this instance, the Court has not done so for the Court declines to assume any party's burden of advocacy in any case.

First Amendment

For purposes of resolving this motion for summary judgment, the Court assumes that a *Bivens v. Six Unknown Federal Narcotics Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) action could be maintained against defendant. Thus, the Court addresses whether defendant violated plaintiff's First Amendment rights by terminating his employment due to his involvement with an FBI investigation. The following four-part analysis is used by the Tenth Circuit Court of Appeals in analyzing First Amendment claims:

> In cases alleging retaliatory discharge of a public employee in violation of the First Amendment, we analyze the plaintiff's claim using a four-step analysis. First, we determine whether the public employee's speech touches on a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146-47, 103 S. Ct. 1684, 1689-90, 75 L.Ed.2d 708 (1983). Second, if the employee spoke as a citizen on a matter of public concern, we must weigh 'the interests of the [employee], as a citizen, in commenting upon matters of public concern' against the State's interest' as an employer, in promoting the efficiency of the public services it performs through its employees.' *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1735. Third, if the employee's speech interests outweigh the City's

> efficiency interests, the plaintiff must prove the protected speech was a motivating factor in his or her termination. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed.2d 471 (1977). Finally, if the plaintiff makes the required showing, the burden then shifts to the defendant, who must show by a preponderance of the evidence it would have reached the same employment decision in the absence of the protected activity. *Id.* The first two steps must be resolved by the court; the last two steps are ordinarily questions for the trier of fact. *Melton v. City of Oklahoma City*, 879 F.2d 706, 713 (10th Cir. 1989); *Wulf v. City of Wichita*, 883 F.2d 842, 856-57 (10th Cir. 1989).

Cragg v. City of Osawatomie, Kan., 143 F.3d 1343, 1346 (10th Cir. 1998).

Here, defendant admits that the situation with Mr. Tobiason was a matter of public concern. However, defendant argues that the action resulting in plaintiff's termination was not the exercise of free speech. Defendant asserts that plaintiff was terminated for failing to follow supervisory instructions to cease his involvement with the FBI, and hiding his continued involvement with the FBI from the FPD. These actions resulted in a lack of trust within the FPD, and created a potential conflict of interest and potential destruction of the FPD's credibility with their clients. Plaintiff responds stating that his entire involvement with the FBI and Mr. Tobiason was an expression of free speech on matters of public concern, i.e., preventing domestic terrorism.

Plaintiff's initial contact with the FBI regarding his discussions with Mr. Tobiason were clearly matters of public concern and an expression of free speech. Plaintiff was not reprimanded or terminated for his initial contact. Rather, he was praised for his efforts, but advised that he could no longer continue assisting the FBI in its investigation and work with the FPD's office due to potential conflicts of interest, office

disruption, and loss of credibility. Plaintiff agreed to cease his involvement, but continued to assist the FBI by contacting Mr. Tobiason, writing Mr. Tobiason letters and relaying this information to the FBI without the knowledge of the FPD.

The Court questions whether plaintiff's continued assistance in the FBI investigation was a matter of free speech or public concern. The potential threat of domestic terrorism was clearly a matter of public concern, which plaintiff had already disclosed. His right to continue contacting Mr. Tobiason was not a matter of public concern as it involved establishing a relationship with Mr. Tobiason, a matter not disclosed to the public at large. *Koch v. City of Hutchinson*, 847 F.2d 1436, 1447 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988) (holding report compiled during course of official duties is not a matter of public concern as not calculated to inform the public at large).

The public has a great interest in learning of potential threats against society and the prevention of such violence. However, this information was in the hands of federal law enforcement officials who had the power and ability to follow through with an investigation to protect this public interest. Plaintiff's involvement was unnecessary for the investigation. Thus, plaintiff's continued assistance is not, in this Court's opinion, an expression of free speech protected by the First Amendment. *See, e.g. Wilson v. City of Littleton, Colo.*, 732 F.2d 765, 768 (10th Cir. 1984) (holding police officer's wearing black shroud on his badge in mourning is not a First Amendment right because the speech must not merely relate to subject matter of general interest, it must be helpful to the public). *See also Moore v. City of Wynnewood*, 57 F.3d 924, 932 (10th Cir. 1995) (a court must "look beyond the general topic of the speech to evaluate more specifically what was said on the topic.").

Assuming plaintiff's continued involvement in the investigation is a right protected by the First Amendment, the Court finds that the FPD's interest in restricting plaintiff's expression outweighs his constitutional rights. The Court

utilizes a balancing of interests to determine whether defendant's actions violated plaintiff's First Amendment rights. *Lytle v. City of Haysville, Kan.*, 138 F.3d 857, 865 (10th Cir. 1998). This is a question of law for the Court. *Melton v. City of Oklahoma City*, 879 F.2d 706, 713 (10th Cir. 1989), *rev'd on other grounds*, 928 F.2d 920 (10th Cir.), *cert. denied*, 502 U.S. 906 (1991).

Regarding plaintiff's interest in continuing his investigation of Mr. Tobiason, his interests are not entitled to a heightened standard. His actions were not those of a whistle blower exposing corruption of his employer or another public employer. *Lytle, supra*, 138 F.3d at 865 (finding greater weight should be afforded where employee's speech exposes government corruption). Nor is this a case in which plaintiff was prohibited from possibly testifying regarding his initial encounter with Mr. Tobiason.[5] *Lytle, supra*, 138 F.3d at 864 n. 2.

Assisting a criminal investigation could form the basis of a high public interest. *See, e.g. Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986) (holding strong public interest in assisting state investigation of criminal wrongdoing of an employer). This is not such a case. Plaintiff provided the FBI with important information. The FBI no longer needed plaintiff's assistance. Plaintiff recognized his continued assistance was not relevant to the completion of the investigation. He merely wished to continue to play the role of a confidential source. This evidences a purely private interest in continuing to assist the FBI. *Moore v. City of Wynnewood*, 57 F.3d at 933 (holding employee's interest less important and less valuable to public where no new information revealed). Plaintiff's assistance in the

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[5] Plaintiff contends Ms. McNorton told him he could not be a witness against Mr. Tobiason and keep his employment. However, the termination clearly occurred before Mr. Tobiason was arrested or the need for a witness had arisen. This statement is not attributable to defendant, and plaintiff was not fired for being a witness.

investigation did not reveal any wrongdoing of the FPD. Defendant advised plaintiff that if he received further information from Mr. Tobiason to contact his supervisor. Defendant's Motion for Summary Judgment, Ex. A, pp. 133-34, Ex. B, pp. 62-63. Plaintiff was not advised to refrain from relaying any unsolicited information from Mr. Tobiason. Rather, he was instructed not to voluntarily insert himself into an investigation of Mr. Tobiason.

Plaintiff cites numerous cases from other circuits that have no precedential value in this Court, and are factually distinguishable from the instant case. Those cases along with the cases cited within this Circuit are based on an employee's expression of corruption within the governmental agency where he is employed. As discussed above, such a situation is entitled to great deference. Plaintiff cites *Melton v. City of Oklahoma City, supra*, 879 F.2d at 714 in support of his argument. In *Melton*, a police officer learned the prosecution withheld exculpatory material from the defendant, and testified on behalf of the defendant. He was fired for his testimony. The appellate court found the plaintiff's speech to be a matter of public concern and his termination violated his First Amendment right to testify. *Melton* is distinguishable from the instant case because in *Melton* the plaintiff was exposing the wrongdoing of another public official. Here, plaintiff is not exposing any wrongdoing on the part of a governmental agency. Rather, he is investigating the life of a private individual. As such, plaintiff's argument is misguided.

Plaintiff's limited interest is weighed against the FPD's interest in the effective functioning of its office. *Melton v. City of Oklahoma City, supra*, 879 F.2d at 715. The FPD must how some ascertainable damage to its functioning as a result of the challenged speech. *Id.* Unsubstantiated allegations of disruption are insufficient. *Id.* at n. 11. A government's concerns about the impact of the speech must be reasonable and formed in good faith. *Waters v. Churchill*, 511 U.S. 661, 677 (1994). Nonetheless, the Tenth Circuit Court of Appeals has held that the government does not "have to wait for

speech actually to disrupt core operations before taking action." *Moore v. City of Wynnewood*, *supra*, 57 F.3d at 934. The appellate court citing *Waters* stated: "We have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Waters*, 511 U.S. at 673. "Governmental employers should be allowed to 'rely on hearsay, on past similar conduct, on . . . personal knowledge of people's credibility, and on other factors that the judicial process ignores.'" *Moore*, 57 F.3d at 934 (*citing Waters*, 511 U.S. at 676). Reasonable predictions of disruption are appropriate considerations where there is the presentation of specific evidence. *Cragg v. City of Osawatomie, Kan.*, *supra*, 143 F.3d at 1347.

A government employer has a strong interest in preventing an employee's speech which reflects a representation of the employer, or where the employer has reason to discipline an employee's behavior. *Moore*, 57 F.3d at 933-34. "The government needs to maintain 'discipline by superiors [and] harmony among co-workers,' especially where 'close working relationships [exist] for which personal loyalty and confidence are necessary." *Id.* (*citing Rankin v. McPherson*, 483 U.S. 378, 388 (1987)). An employee's responsibilities in the workplace are relevant in balancing the parties' interests. *Lytle v. City of Haysville, Kan.*, *supra*, 138 F.3d at 864. "The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." *Id.* (*citing Rankin, supra*, 483 U.S. at 390). This is relevant where the speech "reflects negatively on the employee's ability and competence to perform [his] job." *Koch, supra*, 847 F.2d at 1450.

In the instant case, defendant has substantial evidence of disruption. Plaintiff disobeyed a direct order from his supervisors to cease further assistance with the FBI. Plaintiff continued his assistance without the knowledge of his

employer. Mr. Tobiason knew plaintiff worked for the FPD's office. Plaintiff contacted the FBI during his office hours. Defendant's Motion for Summary Judgment, Ex. H. Plaintiff did not inform his employer of his continued involvement until he revealed his assistance to another co-worker. After learning of plaintiff's continued assistance, Ms. McNorton and defendant determined plaintiff was no longer trustworthy and continued to threaten the basic functions of the FPD. *Id.* Plaintiff's function as an investigator was one of trust and confidence between himself, the FPD's office and the criminal clients of the FPD's office. *Id.* Plaintiff's investigation on behalf of a law enforcement agency was diametrically opposed to his duties as an investigator for the FPD. Moreover, Ms. Gilman, an attorney with the FPD indicated that she would no longer be able to trust plaintiff as an investigator in her cases. Although Ms. Gilman made this statement after plaintiff had been terminated, it was made with the thought that plaintiff would obtain re-employment with the FPD pending an administrative appeal of his termination.

Defendant's decision to terminate plaintiff was not based on mere speculation, but on evidentiary support including his personal opinion and loss of trust, the opinion of plaintiff's immediate supervisor, and an attorney within the office. *Waters v. Churchill, supra*, 511 U.S. at 680 (holding employee's statement that she would not tolerate the plaintiff's expression disrupted the employment atmosphere and outweighed plaintiff's First Amendment rights). Defendant indicated in his termination letter to plaintiff that plaintiff's action of continuing contact with the FBI and Mr. Tobiason after requested not to do so "constitutes a breach of trust, and has created an atmosphere wherein you can no longer be trusted to do what you are told, or to keep sensitive information confidential." Defendant's Motion for Summary Judgment, Ex. H. In a letter affirming his decision on appeal, defendant wrote: "[w]e had an employee [plaintiff] with access to all of our confidential documents having secret meetings with the F.B.I. against not only my explicit order,

but also his own promise, made in seeming sincerity but not in good faith. It is among the most serious category of employee misconduct with which I have been presented, and placed at risk is the institutional integrity of the entire office." *Id.* at Ex. I. *See Connick v. Myers*, 461 U.S. 138, 150 (1983) (holding employee questionnaire circulated in-office created an act of insubordination that interfered with the close working relationships in the office, and defendant's termination of employee was warranted). *See also Lytle v. City of Haysville, Kan., supra*, 138 F.3d at 867 (co-employee's statement that he no longer trusted the plaintiff was sufficient evidence of disruption). Even though plaintiff was fired before attorneys in the office were required to make a judgment regarding his future trustworthiness, defendant's predictions of disruption were based on more than mere speculation. *See, e.g. Jantzen v. Hawkins*, __F.3d __, 1999 WL 674492, *10 n.8 (10th Cir. 1999) (noting actual disruption may be shown by reasonable predictions of disruption; thus plaintiff's termination was appropriate where evidence that office was uncomfortable because employee ran an election campaign against his boss existed).

Plaintiff's actions of disobeying specific instructions, concealing his involvement until he knew his assistance would be discovered, the nature of his position within the FPD and the knowledge of Mr. Tobiason concerning plaintiff's employment, render defendant's interest much greater than those of plaintiff in continuing his role in the investigation. Judgment is entered in favor of the defendant.[6]

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[6] The Court is surprised that plaintiff failed to address any free association claim in light of certain statements made to the Court and defendant in this case. Nonetheless, the Court finds that to the extent a free association claim is made, it is intertwined with the freedom of speech claim and under the Pickering analysis, defendant's interests far outweigh those of plaintiff. See Schalk v. Gallemore, 906 F.2d 491, 497 (10th Cir. 1990). Further, the Court finds that plaintiff has no First Amendment right to associate generally with Mr. Tobiason or Agent Vick. See Copp v. Unified School Dist. No. 501, 882 F.2d 1547, 1551 (10th Cir. 1989) (right

Qualified Immunity

An evaluation of a qualified immunity defense is unnecessary where no constitutional violation has been found. As the Court has found no constitutional violation, the issue of qualified immunity is moot. Nonetheless, the Court alternatively finds that defendant is entitled to qualified immunity in terminating plaintiff. "[G]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Once a defendant has asserted a qualified immunity defense, the plaintiff has a two-step burden to present facts sufficient to show that defendant's alleged conduct violated the law and that the law was clearly established at the time of the violation. *Wilson v. Meeks*, 52 F.3d 1547, 1552 (10th Cir. 1995).

Here, plaintiff is clearly entitled to free expression under the First Amendment. However, as discussed above, his continued assistance in an FBI investigation is not clearly a matter of protected free expression. An examination of the "content, form, and context" of his continued assistance is not "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers*, 461 U.S. at 146. Plaintiff correctly argues prevention of domestic terrorism is a matter of public concern. However, plaintiff's initial contact with Mr. Tobiason and the FBI revealed this public interest matter. His continued assistance was neither necessary nor a matter of public concern. His interests were purely private in nature, i.e., being the one to prevent a potential massacre. Defendant did not fire plaintiff for the expression of the public interest.

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limited to enter into and maintain certain intimate human relationships). Finally, plaintiff's possible status as a witness against Mr. Tobiason provides him no First Amendment right rising to the level of "assisting in litigation." Id. (right extends to assisting another in the redress of a civil rights claim).

Rather, he fired plaintiff for his continued involvement after he was asked to cease in the investigation, and his insubordination. Thus, defendant could not reasonably have known that terminating plaintiff was a violation of his First Amendment rights, and is entitled to qualified immunity.

Even assuming plaintiff's continued assistance in the investigation could be construed as a matter of public concern, defendant reasonably concluded under a balancing of the *Pickering* factors that the FPD's interest in maintaining an effectively functioning office outweighed plaintiff's minor interest in continuing to act as a "confidential source." The Tenth Circuit Court of Appeals recognizes "a rule of law determined by a balancing of interests is inevitably difficult to clearly anticipate." *Prager v. LaFever*, 180 F.3d 1185, 1191 (10th Cir. 1999), *petition for cert. filed*, September 13, 1999 (*citing Melton v. City of Oklahoma City, supra*, 879 F.2d at 729). "Nevertheless, 'to the extent that courts in analogous (but not necessarily factually identical) cases have struck the necessary balance, government officials will be deemed "on notice." ' " *Id.* (*citing Melton, supra*, 879 F.2d at 729, n. 36).

The question is whether defendant was reasonably on notice that the FPD's termination of plaintiff for his insubordination and continued assistance with the investigation was outweighed by plaintiff's interest in continuing with this investigation. The parties do not direct the Court to any analogous cases. The cases cited by plaintiff reflect an employee's right to expose official corruption, not the wrongdoing of a private individual. Further, these cases do not reflect an employee's right to continue expressing his views on the same subject once such views have been publicized.

Moreover, defendant advised plaintiff of the FPD's concerns and gave him the choice of continuing his employment or continuing with the investigation. Plaintiff chose to remain employed with defendant and indicated that he would no longer assist the FBI. Despite plaintiff's assurances to the contrary, he continued to assist the FBI.

After learning of plaintiff's insubordination, defendant terminated him. Defendant reasonably and in good faith determined that he had not violated plaintiff's First Amendment rights. There was no clearly established law requiring defendant to balance the weighing of interests in plaintiff's favor. Summary judgment is entered in favor of defendant.

Conclusion

Based on the foregoing, the Court finds defendant did not violate plaintiff's First Amendment rights. Alternatively, the Court finds defendant is entitled to qualified immunity, and judgment is entered in his favor. No further issues remain for trial.[7]

IT IS SO ORDERED this ___ day of October, 1999.

s/s _____
WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE

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[7] Any outstanding, unresolved motions are denied as moot.

C-1

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS -

Daniel Rupp,

Plaintiff,

vs.

David J. Phillips,
In his personal capacity as

Defendant.

Case No.: 99-2101-WEA

AFFIDAVIT OF DAN RUPP

1) My name is Dan Rupp.

2) I met Timothy Tobiason—a vendor at a gun show—in early to mid 1997.

3) Tobiason was a vendor who was selling books and manuals related to various types of improvised warfare and home defense, including the design and manufacture of biological and chemical weapons of mass destruction.

4) Tobiason was selling a set of books in a series entitled "Scientific Principles of Improvised Warfare and Home Defense. When we first met in 1997, Tobiason was selling a manual entitled "*Military Phosphorus Chemical Weapons and Nerve Agents—Advanced Chemical Weapons Design and Manufacture—Chemicals that kill in 30 seconds or less (or your next book is free). See* Exhibits 1, 2 & 4 to my Complaint incorporated here by reference.)

5) The manual began with the admonition, "If there is one good reason to teach every living soul on the entire

planet how to make nerve gas, it would be the mere existence of lawyers."

6) The manual described in great detail how to make nerve gases, including sarin.

7) The end of the manual concluded with this statement:

8) A few days ago, I was traveling to a gun show and became stuck in a traffic jam in Chattanooga. They had funneled four lanes of traffic into one for major replacement of part of the interstate. It was hot and humid, and I had no air conditioning, and my patience had reached its end so I became Darwinian in my thinking. I finally decided that if they ask me why I wrote this book I would tell them "to reduce traffic congestion." You see. I can still use humor to fight back.

In the end, Washington and all the state governments need to know that they cannot simply write laws and expect to control and regulate all of the people and their lives. The people can in fact, finally refuse to obey and live by their rules any longer. The power of the government to send masked police, or even the army into peoples homes, has up to this point in time given them the power to impose their rules on everyone. Their (sic) is only one way to balance this power and that is to make sure that the citizens have such knowledge in their possession that the power of the police and the army effectively becomes irrelevant. On that day, this government will have to find new rules that are in fact just for everyone, not just the ones who fund their election campaigns.

9) I struck up a conversation with Tobiason and became acquainted with him. I learned Tobiason was very disgruntled with regard to how he had been treated by the government in business and in his personal life.

10) I met again with Tobiason at a gun show on June 6, 1998.

11) Tobiason was selling a new manual entitled *Advanced Biological Weapons Design and Manufacture (Why pay to recruit troops and build factories to wage war and kill for you when nature will do it for free. Or, if you can make jello, you can wipe out cities—Enjoy!)"*.

12) One manual had chapters on:

a) Biological entry by respiratory, gastrointestinal, genitourinary and dermal routes.

b) Bacteria Based weapons

c) How to grow and identify bacteria

d) Anthrax

e) Botulism

f) Tetanus

g) Diphtheria

h) Staphylococcus

i) Streptococcus

j) Pneumonococci

k) E. Coli

l) Salmonella

m) Bubonic Plague, Black Death

n) Cholera

o) Tuberculosis and Leprosy

p) Listeria

13) A sample from a couple of pages of one of the 250 page books is particularly chilling. In the chapter on Bubonic Plague, Tobiason states that the culture can be made "in a salt shaker apparatus that can easily be attached to the underside of vehicles with magnets and carried into the

area by trusted workers. [*This method is called reverse* conscription in which the enemies conscripted workers and soldiers can unknowingly be conscripted by you to fight against their own organizations for you. If governments can force their own people to fight for them and uphold their tyranny, then you certainly can do it as well.]

a) "It is recommended that Y. pestis be used in cocktail weapons where multiple organisms can act together to increase each others invasiveness and help break down host defense. The use of all 3 strains of Y. Pestis or all 3 species of Yersinia along with other organisms should overcome vaccine defenses. The use of cholera in these combinations is not advised.

b) [Authors note: In conversations with federal undercover agents, I have frequently been told euphemistically that "they can kill you whenever they want" which obviously is intended to mean the US government. My response so far has generally been to tell them that I could kill them six months after I am dead with nothing more than a Christmas card with anthrax and poison ivy, or flea eggs, blood Jell-O and plague. The ultimate weapon that citizens can use against a tyrannical government is not only the knowledge of how to recover, grow and deliver these diseases as a weapon, but to be able to arm and equip and entire army with this ability. . .The net effect is that you now have an army armed with invisible and self reproducing bullets. The only safe people in the government are those living in space suits since any vehicle, piece of mail, package, or object can easily be infected. Those in government who think they can control a population with police or an army can be easily disposed of, as well as their army. The simple idea of anthrax or plague on a tree branch with poison ivy or itching

powder, or on dust inside of a sealed drawer in your home can instill fear an death in the enemy. These make easy, lethal, invisible, reproducible, and highly effective booby traps that the enemy cannot easily associated with any particular person or location. And they can be killed by the thousands just by the act of brushing against a tree branch in the wrong area.

c) If the US government, or any other government, for that matter, thinks they can disarm and regulate every aspect of their citizens lives simply because they can take away their subjects money and use it to hire an armed system of police and army to enforce their rules, they are in for a rude awakening. Most people in a society follow the rules either out of the law, or respect for it and their fellow man. The experiences of my life have proven over and over repeatedly that the laws of the United States (and many other countries) don't even mean anything. Even the US Bill of Rights amount to little more than a bunch of worthless words on a piece of paper. That is why I have written this book. The people of this country and not a lot of bought and paid for politicians who write "Jim Crow" financial and property ownership laws will decide under what rules we are going to live. Even the ability to raise vast sums of money and hire huge armies isn't going to protect unjust governments anymore. The only thing that can protect them now is fair laws that people can live with. If the laws of this nation are not going to be fair then it is my right, and my duty to fight this government any way I can, even if it costs me my own life. Writing this book is one way of fighting their tyranny. There are many other ways as well. *See* Exhibit 2.

14) Tobiason and I talked again, and Tobiason felt comfortable discussing scientific and other personal matters with me.

15) Tobiason made statements which suggested to me that Tobiason had crossed the line from doing library research related to chemical and biological weapons, to actually having created biological weapons, to wit nerve agents, in small quantities.

16) Tobiason told me that he had biological weapons and that he was going to use them against the United States Government and its people and officials.

17) Tobiason also told me that he was under surveillance and that he "could have a surprise" ready for agents.

18) I had read Tobiason's manuals, and I judged that Tobiason had the educational and practical knowledge to carry out his threats.

19) Tobiason told me about his experimentation with toxic biological chemicals. He mentioned using jello to grow a medium-like toxic material, and also discussed using Malathion and/or Parathion, using ultra violet light to switch the ionic charges of the chemicals to turn the substance into a nerve gas.

20) Tobiason discussed the history of Anthrax with me and how to get the Anthrax ingredients from nature to obtain the necessary bacteria. Tobiason told me that he had his own culture medium by using household jello. He also discussed using blood powder (dried slaughterhouse blood), which is used as proteins to get the bacteria to grow.

21) I said, "where are you going with this?" Tobiason said, "It ain't going to be pretty, and its coming real soon." Tobiason added that the Oklahoma city bombing would be nothing compared to what he was planning to do with manufactured biological weapons.

22) I believed that there was imminent danger that Tobiason would carry out his threats and violate federal and state laws. I believed that Tobiason had already violated federal law by creating nerve agents and biological weapons.

23) I felt that if Tobiason went through with his threats and I had not done everything he could to stop it, he couldn't live with himself. (By way of comparison, Michael Fortier was fined $200,000 and sentenced to 12 years in prison for failing to alert authorities in advance about the Oklahoma City plot.)

24) Because of that belief, on the following Monday morning after the gun show, I contacted federal law enforcement agencies to report what I knew of Tobiason and was put in touch with Paul Vick, an FBI agent. Vick and I discussed what I could do to get more information about Tobiason. I believed Tobiason might be at a gun show in Wichita the week of June 13, 1998.

25) The same day, I informed David Phillips and Cindy McNorton of the situation.

26) I advised them that the FBI might want to record a conversation with Tobiason.

27) Vick said they needed to know where Tobiason would be next. They had only a post office box address for him.

28) I immediately turned this letter over to the FBI.

29) On September 9 or 10, I was talking with Sharon Aldridge, a paralegal in the office, who asked what I had planned for his birthday that weekend. I told her I was going to dinner and planning to attend the gun show on Saturday with a friend. I added that I also had to do a favor for the FBI. She suggested that I call Cindy McNorton. I called Cindy and explained the situation to her.

29) McNorton said that she would get back with me.

30) McNorton did not get back with me before the gun show and never instructed him not to attend or stay away from Tobiason.

31) I attended the gun show on Saturday, where I had a conversation with Tobiason

32) Tobiason was selling a new book wit high quality computer generated color photographs showing some of the bacteria he cultivated. (See Attachment)

33) I told Tobiason he was surprised to see him. Tobiason responded, "I'm not dead yet or in jail."[1]

34) Tobiason told me that federal agents were "still messing with me", bothering him, following him, and wanting to talk to him. He said the government was sending people in to get close to him, but he knew they were agents.

35) Tobiason discussed putting the plague virus on scotch tape, then putting it in letters, and mailing the letters to all National Rifle Association members nationally. The reason he said he wanted to do this was so that the NRA members could culture the virus. Tobiason said he wanted their assistance in prosecuting a war against the United States government, because he said, "the government needs to be stopped." He said he wants "this stuff" (the plague virus) out there" and also wanted to get his books out there was well. I asked if he had already mailed the plague virus. Tobiason responded "I could do it."

36) Tobiason said that he was upset over the fact that the government did not approve a submitted patent request for him regarding a phosphate reduction process. He said he was upset about the patent laws "screwing" him, and stated that big businesses, working with the

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[1] Rupp aff., par. ___.

government, were the only ones who can patent new processes.

37) Tobiason said that he planned to attend the Sioux City, Iowa gun show in two weeks and that he had "a surprise for the people screwing with him."

38) He gave me a notarized affidavit dated April 1, 1998 in which he justified his position.

39) He told me that if the government helped him change the patent laws, to make it more fair for people like himself, then he would make his books go away. Tobiason said he had tried to get his story out to news media companies, including the national press. However, they all turned him down, including the *National Enquirer*.

40) He stated, "I'm not afraid to die. I'm ready to fight. What do I have to do, kill a million people to get them to print my story?" These statements were made in front of others besides me, including Jenny McCaslin, a friend of mine.

41) I had another conversation with Tobiason at the gun show on Sunday, September 14, 1998. I said, "I hope to see you next year (at the next gun show). Tobiason replied, "You won't see me next year, You'll read about it (in the news). They've gone too far." I tried to talk him out of carrying out any of his threats. However, Tobiason advised me that his mind was made up. He said, "It's too late for that."

42) Tobiason compared himself to Timothy McVeigh and Terry Nichols and said, "I'm not going to be around afterwards to deal with any consequences." He said, "The govnerment has gone too far, and someone needs to stop them, and I'm going to stop them."

43) Tobiason refused to provide any specific details of intended actions. He did state that his delivery methods and techniques were almost infinitely variable. He stated that he could send the plaque virus around in the mail, or

"I don't even have to use the mail." "I can put ethylene oxide (a gas) through the pipes into any building, even the White house.

44) Tobiason admitted making viruses, which is a violation of law.

45) Tobiason said that government agents had spoken with him and asked him what he wanted in order to stop putting out that type of material, and he said he wanted a change in the patent laws to make it fair for people like him to obtain patents.

46) In conclusion, Tobiason told me that I would not be seeing Tobiason again. He said the book business was not working out financially. He said he was going to "fight them, someone has to, and I'm going to do it."

47) Based on those conversations, I was very concerned for the safety of the American public and federal law enforcement agents.

48. I reported my conversations with Tobiason to Agent Vick

48) I told Phillips I didn't think I did anything wrong, because the FBI said that I wouldn't be a witness. Phillips replied, "They always say that."

48) I told Phillips that I was trying to prevent a disaster.

I, Dan Rupp, declare under penalty of perjury that the foregoing is true and correct and based upon my personal knowledge (unless otherwise stated). Executed on September 27, 1999.

/s/ Dan Rupp

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plaintiff,

vs.

DAVID J. PHILLIPS, in his personal capacity,

Defendant.

Case No. 99-2101-WEA

VIDEOTAPED DEPOSITION OF PAUL W. VICK, a witness, taken on behalf of the Plaintiff, pursuant to Subpoena, on the 16th day of August, 1999, at the United States Department of Justice, District of Kansas, 500 State Avenue, Suite 360, Kansas City, Kansas, before

MYLES A. MEGEE,

for AAA Reporting Company, a Registered Professional Reporter, Certified in Kansas and Missouri.

APPEARANCES

For the Plaintiff:

MR. LEE J. HOLLIS
THE HOLLIS LAW FIRM, PA
5100 West 95th Street, 2nd Floor
Prairie Village, Kansas 66207

APPEARANCES
(Continued)

For the Defendant:

MR. DWIGHT DAVID FISCHER
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Wichita, Kansas 67202

For the witness:

MS. JANICE MILLER KARLIN
ASSISTANT UNITED STATES ATTORNEY
UNITED STATES DEPARTMENT OF JUSTICE
500 State Avenue, Suite 360
Kansas City, Kansas 66101

Also present:

Mr. Dan Rupp
Mr. Kevin Steck

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2 - Letter from Rupp to Tobiason 3
3 - Reply from Tobiason to Rupp 3

(The deposition commenced at 10:41 a.m.)

(Deposition Exhibit Nos. 1 through 3 were marked for identification.)

MS. KARLIN: For the record, we have already indicated on the transcript for the deposition of Resident Agent William Seck that this deposition is governed by three authorization letters which are included as part of Deposition Exhibit 4.

PAUL W. VICK,

a witness, being first duly sworn, testified under oath as follows:

EXAMINATION BY MR. HOLLIS:

Q. Could you please state your name for the record?

A. Paul W. Vick, V-i-c-k.

Q. Mr. Vick, you are an FBI agent?

A. Yes, I am.

Q. And you currently reside in Wichita?

A. Yes.

Q. How long have you worked in the Wichita office?

A. A little over three years.

Q. Can you trace your history with the FBI for the Court and the jury, please?

A. Yes. Well, I was a detective on the Wichita police department, quit in Wichita, Kansas from the department in December of '83, and I joined the FBI in April of '84 and was hired to go to Quantico, Virginia and then I went from there to the San Diego division for four years. Then I went to New York City for four years, went back to California for another four, San Diego division. Then I came to Wichita, Kansas and I'm working on my 16th year in the bureau.

Q. All right. And are you currently anticipating any career moves coming up?

A. Yes. In May -- on the 26th of May I took a promotion, supervisory special agent position, in Washington and I'll be leaving there at the end of this week, leaving Wichita to go work in the Washington area.

Q. And what is your exact title or what was it as of the summer of 1998?

A. Special agent.

Q. How did you come to meet Dan Rupp?

A. I had the fine occasion of dealing with Mr. Rupp on a couple criminal cases where as a FBI agent investigating criminal cases in the Wichita area, I was -- on occasion had to go to court, and on one occasion I took two defendants to trial in Wichita, and during the course of that case, Mr. Rupp was assisting federal defenders and I got to know him that way either before the trial or during the trial, and then for a period of time after that on occasion his office -- he in particular would deal with our office on certain cases in the normal course of their office defending people that we were investigating.

Q. What would his involvement be in the normal course of defending cases, Mr. Rupp's?

A. I didn't deal necessarily directly with Dan, but I think -- in trying to set a background on how I met Dan, and I don't remember the exact day. It was a particular trial. But after meeting Dan -- we're in the same Epic Center building at 301 North Main, and I would see Dan coming and going from the parking lot on the fourth floor where our office is. So just coming and going, I would see Dan on a personal basis. But aside from that, I don't remember any specific cases where our office had to deal with their office, but I think that there were a few.

Q. Okay. Just can't remember the specifics?

A. Yeah.

Q. When do you first recall meeting or discussing with Mr. Rupp the Timothy Tobiason situation?

A. June the 8th of 1998.

Q. Okay. And as part of your job as an FBI special agent, did you compile reports of your activities?

A. Yes.

Q. And I'm going to show you what's been marked as Exhibit 1 in front of you. Is that the report that's been -- and your attorney has taken a black magic marker and marked out parts of it that they don't want to reveal for statutory purposes, but other than that, is that your report that you made in connection with your conversations with Mr. Dan Rupp?

A. Yes.

MR. FISCHER: Lee, do you have another copy of those?

MR. HOLLIS: I don't.

MR. FISCHER: Okay.

MR. HOLLIS: I mean, I've got one copy, but I need to refer to it.

MR. FISCHER: Okay.

If I could just take a look at it before he starts to ask questions.

MS. KARLIN: We'd be -- also be happy to make you a copy.

MR. FISCHER: That would be fine if that's okay.

MR. HOLLIS: Okay. Let's go off the record.

(Discussion off the record.)

Q. (By Mr. Hollis) Okay. We're back on the record. Now, was Exhibit 1 a report that you prepared at or near the time of the subjects that you wrote about?

A. Yes. If I could just --

Q. Okay.

A. -- finish answering your first question as far as that this document documents my conversations with Mr. Rupp. Sometimes we in the FBI get accused of being a one-way street, but this does not reflect my conversations with Dan Rupp. It reflects information that he gave me with--

Q. Okay.

A. -- regards to his contact with someone that we had an interest in.

Q. Okay.

A. So I just want to clarify that because --

Q. Okay.

A. -- it doesn't document any verbal things that I told Dan.

Q. All right.

A. So I'll --

Q. Okay.

A. -- try my best today to remember if you ask me questions about --

Q. Okay.

A. -- conversations.

Q. Going back to Exhibit 1, when you wrote the report, you were writing about conversations you had with Dan Rupp and that's what's in the report; correct?

A. Yes.

Q. And it was the regular practice of you as an FBI special agent to maintain reports like that of sources that you talked with?

A. Yes.

Q. And it was in the course of the regularly conducted FBI activity that you kept it?

A. Yes.

Q. And were you the custodian of that document?

A. Of the original?

Q. Or of -- yes.

A. No, the original goes in an informant file that we have in our office in Kansas City.

Q. But you were the person who wrote it?

A. Yes, sir.

Q. Okay.

MR. HOLLIS: Move for admission of Exhibit 1 as a business record. Do you have no objection?

MR. FISCHER: No objection.

Q. (By Mr. Hollis) How did you come to talk with Dan Rupp on June the 8th? And tell me what you recall was said.

A. I don't keep notes with regards to exactly what I say to people that give us information. If I can recall, Dan came down to our office on the fourth floor to give information to me with regards to a concern that he had with regards to someone that he met for the second time at a gun show in Wichita on June the 6th. It was the second meeting that he had with this individual, having met this person a year before that. And I'm not -- I can't tell you whether or not Dan would have provided the same information to any other agent in our office. All I know is -- I don't know why Dan came to me other than

we had kind of a cordial relationship passing in the hallways over a period of time. Anyway, if I remember right, he had some information and I invited him in the office and we discussed the information he provided me on that date.

Q. Okay. And what information did Mr. Rupp provide you on June the -- what day was it?

A. June the 8th.

Q. 8th.

A. Do you want me to basically read the document that he -- I mean, how do you want me to -- just in general?

Q. Well, did Mr. Rupp tell you that he attended a gun show?

A. Yes.

Q. And what did he tell you about who he met at the gun show and what he found out?

A. He told me that he met an individual at the gun show who had a lot of documents for sale that had to do with chemical and biological weapons. He spoke with this individual and -- Dan did -- and the individual made comments that he had a surprise for federal agents that were -- if they tried to arrest him or search his property, he had a -- it seemed that he had a hostility towards federal agents that he thought were following him. And because of the threat issue with regards to the federal agents maybe getting hurt or killed and because of some of the chemical and biological information that this gentleman had in verbal conversations with Dan Rupp and also in writing, Dan felt that it was a real concern to the public that he disseminate this information to us on that date. So --

Q. And what was your feeling about that?

A. I appreciated getting the information. I didn't have really any feelings other than documenting the information that he gave me and I was appreciative of

the information that he gave. With me also knowing the kind of job that he had with the federal defender's office, we did not want to put him at risk with regard to his job. We did discuss options on how he could be of further help to us. I do believe we discussed the option of being a cooperating witness where -- that's a term that we use where a person can be used to testify later. That person may volunteer to be wired up and discuss things with a person that we have an interest in. And that would then necessitate the person eventually having to testify. Dan, if I remember right, told me on the day that he provided the information to us that he did tell his boss or bosses about the fact that he was coming to our office with this information, and at the time I don't believe that his office had a concern with regards to him initially disseminating this information to us, but they did ask him not to become further involved with regards to having to testify because it would be a conflict of interest. So we -- our office honored that request. We have a lot of people that provide information to us in the private and business sector, and we open people up as a confidential source to document information such as Dan provided us and we had the intention of using additional information that he would provide to us on a confidential basis and it would be written up in such a way that he would not be identified and that he would not have to testify in court. And so we felt comfortable with that information or at least that relationship, that if he had any additional information of a real serious threat with regards to this same individual, that we would appreciate his continuing to provide that of information to us.

Q. What's the difference between a cooperating witness and a confidential source?

A. A confidential source is someone, like I said, that just -- that provides us information and their identity is protected. That person is given protection by our office from disclosure. A cooperating witness is someone that

may be a person that has come to us that is in trouble criminally and has information about an associate and for whatever motivation reasons, the cooperating witness will go further to help us than a criminal informant or cooperat -- I use the words interchangeably. A confidential source and a criminal informant are pretty much the same. A cooperating witness is a person then that would agree to testify in court and would not object to wearing a body wire and taking a further -- more overt acts which would cause that person to have to testify later on in court.

Q. When you met on June 6th, what did Mr. Rupp say about Tobiason's experiments?

A. On June 8 you mean?

Q. June 8th.

A. Yeah. With regards to his experiments?

Q. Right.

A. He was told -- Mr. Rupp was told that this individual was using toxic biological chemicals, and he specifically mentioned some kind of a Jell-O which he would grow in a medium-like toxic material. He also discussed using malathion or parathion, using ultraviolet lights to switch the ionic charges in the chemicals to turn the substance into a nerve gas and he discussed some other things.

Q. And did Mr. -- did he say what Mr. Tobiason said about what would happen if any agents came after him?

A. He mentioned that he was going to have a surprise for the agents. He also made some comments about that it's not going to be pretty. It seemed to -- by the way Dan was telling the story to me of his conversation with this individual, that the person had intentions of harming federal agents or, in addition to that, killing civilians as a result of whatever he was working on.

Q. And did Mr. Rupp talk about what Tobiason had said about how to get anthrax and the history of anthrax?

A. Yes.

Q. What is anthrax, by the way?

A. Well, I personally am not a chemist. I think anthrax, the chemical name is b-a-c-i-l-l-u-s anthraces, a-n-t-h-r-a-c-e-s. It's -- they're ingredients from nature which can be used to form bacteria that can be real bad. It's very toxic to humans and it can kill people if it's inhaled or ingested.

Q. Was there another gun show then scheduled for the weekend of June the 13th?

A. I believe so, yes.

Q. And was there some indication that Mr. Tobiason might be there?

A. Yes.

Q. And did you later learn whether or not he showed up?

A. I believe that Dan told me that he did not see him on that day at the gun show in Wichita.

Q. And then did you at some point either on or after June the 8th ask Mr. Rupp to write a letter to Mr. Tobiason?

A. I'm not real sure with -- my recollection is -- how that conversation came up. All I can remember is that there was a relationship established between Mr. Rupp and Tobiason, and because of that relationship, I did encourage Dan to continue the dialogue with Mr. Tobiason, and if he wasn't showing up at a gun show, I thought that by his -- I'm trying to get to the question as to -- I'm not sure if I told him to write it or if we just discussed it and Dan didn't have a problem with it or if it was Dan's idea. I'm not sure exactly how that -- the -- that came up, but, nonetheless, I did encourage him, yes, to send a letter to Mr. Tobiason.

Q. And what was your understanding of Mr. Rupp's background with Mr. Tobiason in terms of when he had first met him and what they had discussed at that time?

A. I'm not sure that Dan had a close relationship with this person, but I know that a year before at a gun show Dan had met this individual and had conversations with him and was a little concerned I think at that time a year ago, a year previous to that June of '98, that this individual had some similar interests with regards to just weapons and general chemistry conversations. And so when he met him then again in June of '98, he renewed the -- I don't know, the relationship that he briefly developed the year before, so...

Q. And Mr. Seck, your supervisor, testified that he believed that a public safety issue was involved here. Do you agree with that?

A. Yes.

Q. Why?

A. Just from the information that Dan gave me that came from the lips of this individual and from some of the written materials that the individual had which were later provided to me by Dan, and any comments about the fact that we're following him or that -- and that he's hostile towards federal agents and he intends to have -- he has a surprise for them and in the same context he's talked about how many people could die if -- if he followed through with these ideas of chemical and biological agents that he was experimenting with, that there was a possibility that people could die, federal agents could get hurt or killed, and so I did think it was a safety issue.

Q. Did you have him under surveillance otherwise?

MS. KARLIN: Objection. This is outside the scope of his authorization.

Q. (By Mr. Hollis) Your lawyer won't let you answer that question then?

A. I'd feel uncomfortable answering that question at this time.

Q. Because it's outside the scope of --

A. Yes.

Q. -- what you're allowed to testify to?

A. Yes.

Q. So there was a discussion of -- well, Mr. Tobiason failed to show up for the June 13th gun show and then you discussed with Dan how to reach him. Did he have a telephone number?

A. This individual deals with an address. His literature has an address, like a PO box in Nebrask -- well, in the United States, and I don't believe that there was a phone number associated with -- with this individual. There may have been, but I think that we only discussed the possibility of Dan sending a letter to the PO box.

Q. And why did you want -- why were you encouraging that that be done?

A. I was hoping that this individual would continue to provide Mr. Rupp with, if not his intentions if people were going to get harmed, I was hoping to find out any additional information that this person might be -- might have that he would be providing Mr. Rupp, and also perhaps the schedule that -- of the gun shows that he's going to attend in the future, and also the -- I know that Dan had a real concern about that this gentleman may carry out these threats, and so Dan wanted to basically tell the guy not to follow through with any of these threats. So he was actually trying to, in my opinion, diffuse the situation by encouraging this guy not to carry through with some of the threats that he had heard him make.

Q. And is Exhibit No. 2 a copy of the letter that Dan Rupp wrote to Mr. Tobiason?

A. Yes.

Q. And the note at the bottom, that was something that Mr. Rupp included. Was that at your suggestion or his idea or do you remember?

A. I don't recall whose idea it was, to be honest with you. The comment about please advise when you may be at this town again and please do not act until we talk, I believe that Dan came up with that idea as far as his concerns that guy not act. So that -- that may have been Dan's.

Q. Okay. And then is Exhibit 3 a copy of the response and the accompanying envelope that came back to Mr. Rupp?

A. Yes.

Q. And can you read what Mr. Tobiason wrote at the bottom of Exhibit 3?

A. "Dan, I have already decided an effective and quite appropriate solution to both the justice system and government's actions. Thanks anyway."

Q. And below that?

A. "Be at Wichita 13" -- "11 to 13 September" -- "Be at Wichita show 11-13 September?"

Q. Okay. And can you tell -- tell us when you talked with Dan about this response letter, Exhibit No. 3, and what you recall of those conversations? In fact, if you can just tell us what you recall of any conversation that you had with Mr. Rupp from June the 8th onward. I know you told us about the first conversation on June the 8th. Then you had another conversation with him sometime after June the 13th where you talked about writing a letter; correct?

A. Yes.

Q. Were there any conversations in between June the 8th and June the 13th or June the 14th?

A. I do know that on the 29th -- are you asking between that time frame?

Q. We'll get to the 29th. But first of all, just to make sure we haven't missed anything, were there any conversations that you had with Mr. Rupp after June the 8th and --

A. I don't recall.

Q. -- and before the letter was written other than what you've told us?

A. I don't recall.

Q. Okay. And after the letter was written, what conversations do you remember having with Mr. Rupp?

A. I did make a -- document a conversation I had with Mr. Rupp on the 29th of June with regards to the letter, and I believe the letter was sent out on or about the 16th of June. And then he received a response back from this individual on the 29th of June. And it was postmarked I believe the 25th of June.

Q. And with respect to the note "Be at Wichita show 11-13 September?" at that point did you ask Dan to go to the show and check on -- see what else he was up to?

A. I don't recall directing Dan to go to the shows. Knowing the job that he had, I do know that he -- Dan has an interest in firearms and I think he was a private investigator previously and he on his own as a civilian has an interest in doing whatever he likes to do, attending these gun shows or whatever. I just asked Dan that if he did have an occasion to go to these shows and if he saw this individual and had conversations with him, I would of course be very happy to know what this

individual told him. And so, anyway, I didn't direct him to go to the show. Dan I believe went on his own.

Q. Did you have any conversations with Mr. Rupp between June the 29th and the middle of -- and -- well, after June the 29th, what conversations can you recall having with Mr. Rupp?

A. I believe I had conversations with Mr. Rupp on the 12th and the 13th of September.

Q. And --

A. And --

Q. Go ahead.

A. If I could just make a comment. One of -- I noted later that one of the reports that you have, on the bottom it gives the date of the investigation, and this is a report that starts out saying that Mr. Rupp was contacted on September the 12th. At the bottom I've got 7/11 -- or 7/12 of '98. That's a typo. That should be 9/12 of '98, September.

Q. Okay. When you talked with Mr. Rupp on June the 29th, are you saying you can't recall any conversations between June the 29th and September the 12th with Mr. Rupp?

A. I don't recall speaking with him, but if you have some information that you could help me with with regards to refreshing my memory, I'd be happy to -- I don't recall the specific dates.

Q. Did you ever go to the public defender office to talk with Mr. Rupp on this subject?

A. I believe that I did go up to their office on at least one occasion to communicate with him, yes.

Q. Which occasion was that? Do you recall?

A. I don't remember.

Q. Was there more than one occasion when you went o the public defender office to talk with Mr. Rupp about this subject of Mr. Tobiason?

A. I don't believe so. I -- I'm not trying to be evasive. I'm just trying to recall. In fact, I don't even know if I ever went up there to have him contact me. Usually when we develop a relationship with someone that's providing us information, we try to -- I know that I told Dan to keep it quiet that we were helping him -- I mean that he was providing us information just because we like to protect anybody that's providing us information. So because I've had dealings with their office before, it's not unusual for me to go up there and just say, "Hey, could you have Dan contact me?" But generally, these meetings were set up -- I'd either get a phone call from Dan or he'd just stop in the office if he had information. So I honestly can't remember if I went up there specifically with regards to this issue.

Q. But you asked Mr. Rupp to keep confidential your dealings with him?

A. Yes. This is after the first day that he provided us the information on the 8th of June.

Q. And after the September -- what did you talk with Mr. Rupp about in September?

A. On the 12th of September, Dan had another meeting with this individual and there was a conversation that I was -- I mean, Dan Rupp told me that the source told him that he, the source -- I mean -- excuse me. The source was surprised to -- there was a quote, surprised to see you, and this individual responded, I'm not dead yet or in jail. That was one comment. And in the same meeting on the 12th of September, that individual stated that federal agents were still messing with me, bothering him, following him, and wanting to talk to him. The government was sending people in to get close to him,

but that individual knew that they were agents. These were conversations that he had with Dan Rupp.

Q. And did Dan Rupp say that Mr. Tobiason had a story to tell about his complaints with respect to his problems with the government?

A. Yes.

Q. And what did Mr. Rupp say Tobiason said about getting his story out?

A. I can't remember if it was that day or the following day when the individual said that -- what do I have to do, kill a million people, or I forget the number of people that he was talking about killing to get attention to his cause. Oh, I see. It was on the 12th of September, referring to this report. "I'm not afraid to die. I'm ready to fight. What do I have to do, kill a million people, to get them to print my story?"

Q. Then did you talk with Mr. Rupp again on September the 13th?

A. Yes.

Q. And what did Mr. Rupp say that Mr. Tobiason said when Rupp asked, "See you" -- or said, "See you next year"?

A. Mr. Rupp heard -- well, this individual told Mr. Rupp, quote, I'm not going to be around afterwards to deal with any consequences. The government has gone too far and someone needs to stop them and I'm going to stop them. He made some other comments such as, "It's too late for that." When -- when Dan I think was trying to diffuse the situation, initially the gentleman told Dan, "You won't see me next year. You're going to read about it in the news. They've gone too far and it's too late for that," with regards to Mr. Rupp trying to get this guy to change his mind. So it seemed pretty ominous, the information that was coming out from this individual.

Q. And what did Mr. Tobiason say about his delivery methods?

A. He seemed to talk as though he had some expertise or experience in this area and he said -- he stated that he can send the plague virus around in the mail or I don't even have to use the mail. I can put ethyl -- ethylene oxide, which was a gas, through the pipes into any building, even into the White House. He didn't personally threaten the life of the President, but he used the security of the White House as an example of how he could get -- could target locations. He did not mention using explosives or nerve gases -- nerve agents or biological agents at that time, but he talked about putting this gas or interjecting gas into the White House.

Q. What did he say about viruses?

MR. FISCHER: I'm just going to object here. This is getting into some hearsay because you're asking him what Tobiason said as opposed to what Rupp told him Tobiason said.

Q. (By Mr. Hollis) What did Rupp say Tobiason said about viruses?

A. I'm not sure.

Q. I think it's 7/13, page 2, or 9/13.

A. Oh, Mr. Rupp was told that this individual was making viruses. That was something that Dan Rupp was convinced of just from the way that he talked and he indicated that he may even have some of these viruses in his van out in the parking lot.

Q. And what did he say in conclusion, Mr. Rupp say that Mr Tobiason said in conclusion?

A. He stated that sometime in the past, government agents whom he assumed were National Security Agent agents spoke with him and asked him what he wanted in order to -- to get this person to stop putting out this type of

material. And this is the written materials that he disseminates all over the place when he goes to these conferences. The individual was telling Dan that he wanted the patent laws changed to make it more fair for individuals like himself to obtain patents. He acted like he had come up with some ideas or patents that weren't getting approved and he seemed to be real disgruntled over that issue. He concluded on that particular meeting that Mr. Rupp would not be seeing him again and that the book business wasn't working out financially and he ended up by saying that he was going to, quote, fight them. Someone has to and I'm going to do it.

Q. And these notes are taken in connection with your investigation of Mr. Tobiason?

MS. KARLIN: Objection. I think that's outside the scope of the authorization.

Q. (By Mr. Hollis) Your lawyer won't let you answer that?

A. Yes.

Q. Was the situation with Mr. Tobiason an apparent emergency?

MS. KARLIN: Objection. The authorization letter talks about conversations between Mr. Rupp and this agent. I have allowed him to go a little bit just by way of background, but I'm not going to let him talk about whether the FBI felt it was an imminent threat, a natural disaster. I think he's gone as far as we really should allow.

MR. HOLLIS: Okay. Well --

MR. FISCHER: I also want to object that it calls for speculation.

MR. HOLLIS: I'm just going to ask a few questions and if you want to instruct him not to answer, that's fine.

Q. (By Mr. Hollis) Did the FBI have anyone in a better position to do what Dan was doing in terms of contacting him than Dan?

MS. KARLIN: Objection, outside the scope of the authorization.

MR. HOLLIS: Instructing him not to answer?

MS. KARLIN: I am.

Q. (By Mr. Hollis) Was there other information about activities that Tobiason had been involved in that you had possession of other than what Dan Rupp had told you about?

MS. KARLIN: Objection, it's outside the scope of the authorization and I instruct him not to testify.

Q. (By Mr. Hollis) Is it a federal crime to develop and threaten the use of weapons of mass destruction?

A. It's a federal crime to generate biological agents and then use them to threaten or kill or harm people. It has to be a combination of both. If a person just develops a virus or something that's harmful, if it's not coupled with a threat or an actual act or an attempt -- you know, some kind of a threat or an action, it's not against the law.

Q. Was Dan Rupp ever employed by the FBI?

A. No, he was not.

Q. Did he ever work undercover?

A. No, he did not.

Q. Was Mr. Tobiason considered dangerous?

MS. KARLIN: Objection. It's outside the scope of the authorization and he is not to testify.

Q. (By Mr. Hollis) Did you have any other activities planned for Dan Rupp or was the September gun show the last thing that you had in mind for him to do?

MS. KARLIN: Objection, outside the scope of he authorization. I instruct him not to testify.

MR. HOLLIS: I think I have no further questions at this time.

EXAMINATION BY MR. FISCHER:

Q. Agent Vick, my name's Dwight Fischer. I'm here on behalf of Dave Phillips, federal public defender, who's the defendant in this case. Is it your understanding from your conversations with Mr. Rupp that Mr. Tobiason displayed these manuals that he produced, that he displayed them in public at these gun shows?

A. Yes.

Q. And that he discussed them in public?

A. Yes.

Q. And that they were for sale in public places?

A. Yes.

Q. And that he even went so far as to market these materials; correct?

A. Materials that did not talk about threatening federal agents and killing people, but materials that told people how to make these various types of chemical or biological agents, yes.

Q. And materials that would be cause for concern?

A. They're scientific materials which caused concern when I looked at them, but they're -- if you're in the scientific industry or -- it's kind of how-to type books. Selling them at a gun show to people that just come there, normal citizens, I would think a normal citizen would be concerned about those materials and there were concerns. There.

Q. So you had no reason to think that he was producing these manuals in secret; he was public about these manuals --

A. Yes.

Q. -- correct?

A. Yes.

Q. Based on what you said before, Mr. Rupp served as a confidential source; is that what you referred to him as? Is that correct?

A. Yes.

Q. And that's something that you use from time to time in the FBI; correct? He wasn't the first one you've ever had?

A. Correct.

Q. You also discussed how there's a distinction between a cooperat -- or a confidential source and a cooperative witness; correct?

A. Yes.

Q. Is there any time that a confidential source becomes a witness without being cooperative?

A. Repeat the question. Is there a time -- if I understand it right --

Q. Let me rephrase it. Is it always up to the confidential source whether or not they will be used as a witness?

A. No, it's not. And I'll just give you a brief example. If –

Q. I don't need a brief example. That's fine.

A. Okay.

Q. Did Mr. Rupp ever ask you to be compensated for the information he was providing you?

A. Absolutely not. The only compensation, if I remember, was two instances where I reimbursed Mr. Rupp either 20 or $30 for the purchase of these manuals. I felt that we needed to reimburse him for that.

Q. At times informants are compensated though; correct?

A. Yes.

Q. With a confidential source such as Mr. Rupp -- well, let's just talk about Mr. Rupp specifically. You directed him to keep the information that you shared between the two of you confidential; correct?

A. Yes.

Q. From whom was he supposed to keep that confidential?

A. I asked him to keep it confidential from anybody.

Q. Including his employer?

A. I didn't specifically say who he should not talk about, but I just told him that if he was going to provide us information, it would be best -- we tell all of our sources to keep it confidential from everyone that they're providing information to us.

Q. And everyone would include his employer; correct?

A. Yes.

Q. Did Mr. Rupp -- you can finish taking your notes. Did Mr. Rupp -- and you discussed this before. I just want to clarify. Was it your understanding that before he came and spoke with you, Mr. Rupp had told his employer that he was going to be providing this information to you?

A. I can't remember if -- if he told his employer after he provided the information, just to give them a heads up, that he received some real serious information that he thought was serious that he did turn over to us, and I believe that -- I can't remember if he got -- if he told his employer right before or right after. I believe it was right after, at which time then his employer gave him some

parameters on not becoming involved any further to where he would have to become a witness and some other things like that.

Q. Who discussed those conversations with you? Did Mr. Rupp tell you that he told his employer this and that his employer gave him the parameters?

A. Yes.

Q. You never discussed this with his employer?

A. No.

Q. Did Mr. Rupp ever talk to you over the telephone or in person during regular business hours?

A. I believe so, yes.

Q. Meaning Monday through Friday?

A. Not always. If something came up where he had -- where he met with Mr. Tobiason, he would get in touch with me on the weekend. If he received some information, he would disseminate that to me fairly quickly. So I'm not sure exactly what day of the week these contacts were on, but I think some of the contacts were during business hours.

Q. Meaning Monday through Friday, approximately eight to five, there may have been times when you met with him --

A. There may have been, yes.

Q. -- or spoke with him during those times; correct?

A. Yes.

Q. Mr. Rupp told you that Mr. Tobiason had said that he thought he had been contacted by agents of the National Security Agency previously?

A. That's what he told Mr. Rupp.

Q. So based on what Mr. Rupp told you, Mr. Rupp had reason to believe that government agents had previously contacted Mr. Tobiason; correct?

A. All I can tell you is what Dan told me, and with regards to this individual telling Dan that he had been contacted, he was a very paranoid individual and thought that he had been contacted by undercover agents or people with National Security. Whether that happened or not, I'm not in a position to say at this point.

Q. Through the time of your September 12th and 13 meetings, 1998 meetings with Mr. Rupp, during those meetings or at any time beforehand, did you discuss with him additional contacts you would like to have him made with Mr. Tobiason? Did you ever discuss the possibility of this continuing in the future?

A. Yes.

Q. Did you discuss any specifics with him in terms of specific contacts you wanted him to have with Mr. Tobiason in the future?

A. No, I think that each time I met with him or that he gave me information, I just thanked him for the information and encouraged him to continue the contact with this individual.

Q. Did you ever give him specific directions of contact to make?

A. Other than discussing this letter to see what kind of a response it would generate back, I don't remember telling him anything other than what he was going to do really in his private time on weekends going to these gun shows as a private citizen, not on company time, you might say, and if he came across more information that we'd be interested in, I encouraged him to continue to provide us with that information.

Q. And in terms of the letter, you said before you couldn't recall whether it was your idea or whether it was Mr. Rupp's idea to generate the letter; correct?

A. I can't remember at this point.

Q. When you met with him or spoke with him in September the 12th and 13th of 1998, had there been any arrangements made for you to meet with Mr. Rupp again in the future or was it just left open generally, let me know what you hear?

A. I think that it was left open with regards to him contacting me if he came across positive information. That could have been a year from now if he bumped into this gentleman again.

Q. But it was your understanding that there was the likelihood that you would have additional contact with Mr. Rupp regarding Mr. Tobiason; correct?

A. Well, not after the last conversations that Mr. Rupp had with this individual. It seemed that something horrendous or something was going to happen which was going to cause him not to be around much longer. So it was kind of up in the air.

Q. But it was your understanding that if contact did occur, that Mr. Rupp would be letting you know about it; correct?

A. Well, I encouraged him to disseminate information back to us if he had positive information.

Q. You previously discussed the fact that you had met Mr. Rupp at some criminal trials or a criminal trial; is that correct?

A. Yes.

Q. What was your role in that trial?

A. I was the case agent.

Q. Meaning that you investigated the individual that was on trial?

A. Yes, individuals.

Q. And for whom were those investigations conducted?

A. What do you mean, for whom?

Q. They were on behalf of the U.S. attorney?

A. Yes.

Q. And you're aware that Mr. Rupp is an investigator; correct?

A. Yes.

Q. Are you aware of who he investigated for?

A. Yes.

Q. And who did he do investigations for?

A. Are you talking specifically on this one trial or --

Q. As an employment -- during the time you had this relationship with him or this contact with him.

A. For the federal -- federal public defenders.

Q. Are you familiar with what the role of the federal public defender is?

A. Yes.

Q. What is it, in your understanding?

A. They provide legal assistance to defendants that are charged that can't otherwise afford a private attorney.

Q. And these are individuals oftentimes who the FBI has investigated on behalf of the U.S. attorney?

A. Yes.

Q. And the U.S. attorney is prosecuting these individuals; correct?

A. Yes.

Q. And the federal public defender is charged with defending the individuals; correct?

A. Yes.

Q. So oftentimes or generally you're on opposing sides from the federal --

A. Yes.

Q. -- public defender; correct?

A. Yes.

Q. Did it ever cross your mind that Mr. Tobiason may at some point be defended by the federal public defender?

A. I'm not real sure if I gave it much thought, to be honest with you. I'm not sure how to answer that.

Q. Is Mr. Tobiason the type of person that the federal public defender defends?

MR. HOLLIS: Objection, calls for speculation.

Q. (By Mr. Fischer) Is Mr. Rupp continuing assisting you in investigations in any way at the present time?

MS. KARLIN: Objection. I'm not going to object if the question is as to the individual that he was previously -- who has been previously identified as Tobiason, but because the question is broader than that, it is outside the scope of the authorization.

Q. (By Mr. Fischer) Is Mr. Rupp continuing to assist you in your investigation with Mr. Tobiason?

A. Since Mr. Rupp's employment was terminated with the federal public defender, I think that there have been a contact or two with regards to some follow-up with regards to this individual.

Q. Can you tell me about those conversations?

A. I don't recall specifically what -- what they were about.

Q. Were they conversations that you initiated or that Mr. Rupp --

A. I don't think that -- that I initiated -- the agreement, if you want to call it that -- and keep in mind that the whole time that Dan was providing this information to me and to our agency, I was very, very mindful of the fact that -- of who he worked for. And because of that, we tried to stay within the parameters of not compromising his employment.

Q. Okay. I don't mean to interrupt, but I'm right now questioning you about things that have occurred since he was no longer employed.

A. I was trying to get to the point of the fact that more than likely it was just Dan reporting to me by phone or whatever that he had another contact with this individual or that he went to a gun show and didn't see that individual at a gun show.

Q. Okay.

A. That would be pretty much the other follow-up with regards to this particular criminal case.

Q. Okay. I'd just like to move to strike that as nonresponsive and just ask you, have -- are you saying that he's just given you follow-up telephone conversations since he's been terminated by the federal public -- since he -- let me strike that. Since he's no longer been employed by the federal public defender's office, it's your testimony that he has contacted you in regard to Mr. Tobiason?

A. Yes. That's not the only thing that we would discuss, however, in these subsequent meetings.

Q. Well, what else would you discuss?

(Discussion off the record.)

A. It mostly had to do with the demise, his demise you might call it, with regards to your office and proceeding

with plans that he had to I believe try to get his job back. And so they had to do with dealing with a lawyer or lawyers and information that he was trying to get from us that may be helpful in his case.

Q. (By Mr. Hollis) And what information was that that he was attempting to get from you?

A. I believe reports that would document at least the contacts that he had with our office, something that could be helpful to him later on.

Q. And those are the reports that have been used --

A. Yes.

Q. -- as exhibits today --

A. Yes.

Q. -- correct? Have you done any investigation of Mr. Tobiason that did not involve Mr. Rupp?

MS. KARLIN: Objection, outside the scope of the authorization.

Q. (By Mr. Fischer) And so you're not going to answer because of the instructions of your attorney; correct?

A. Yes.

Q. Do you feel the FBI was capable of investigating Mr. Tobiason without the assistance of Mr. Rupp?

MS. KARLIN: Objection. It's outside the scope, instruct him not to testify.

A. Prefer not to answer that.

Q. (By Mr. Fischer) The FBI is a government agency; correct?

A. Yes.

Q. And you have offices throughout the United States; correct?

A. Yes.

Q. Approximately how many full-time employees does the FBI have? Do you know?

A. 27,000, I think.

Q. And offices throughout the United States?

A. Around the world, yes.

Q. Around the world. Do you have any idea what the FBI's annual budget is?

A. I would not want to make a guess, but it's in the billions.

Q. And going back to your discussion of Mr. Rupp being a -- what did the CS stand for? Confidential --

A. -- source.

Q. Confidential source. He's not the only confidential source you've ever used; correct?

A. No.

Q. During your first conversation with Mr. Rupp, you testified previously that you discussed the possibility of there being problems with his employer regarding his role in assisting you; correct?

A. I don't think that we used it in the context of problems, but I do know that Dan spoke with me with regards to the federal public defender's concerns that Dan not be a witness and that there may be a conflict of interest, and so we were real careful about not receiving any information from him on any -- anything that your office was doing other than him reporting these pretty minimal contacts with this individual that we had an interest in.

Q. So at the beginning of this contact with Mr. Rupp, you were aware that his employer potentially had concerns about his involvement with you?

A. At the end of the first day that he provided the information to us, yes, I did know.

Q. And based on that, you still instructed him to keep any information he had confidential from his employer; correct?

A. Only within the parameters of your office, the federal public defender's office, not wanting him to ever be a witness. And we -- the whole case that we had with regards to Dan providing us information was kept in that context. He would never have been a witness.

Q. Okay. I'm just going to move to strike that as nonresponsive. Let me rephrase my question. Knowing that you did that his employer potentially had concerns about his involvement in this investigation, even knowing that, you told him to keep his involvement confidential from everyone; correct?

A. Yes.

Q. And as you've said before, everyone would include his employer; correct?

A. Yes.

MR. FISCHER: I have no further questions.

REEXAMINATION BY MR. HOLLIS:

Q. I have just a few follow-up questions. First of all, was it possible in your mind that Mr. Rupp would become a witness in the Tobiason case?

MR. FISCHER: I'm going to object. That calls for speculation.

Q. (By Mr. Hollis) You can go ahead. And I'm just asking the question that Mr. -- you answered a few moments ago that Mr. Fischer asked to be stricken from the record. What was your thought about the likelihood of Mr. Rupp becoming a witness in the Tobiason case?

A. Zero.

Q. In all of the conversations that you had with Mr. Rupp through the summer and fall of 1998 about Mr.

Tobiason, did Mr. Rupp ever talk about any other cases that the federal public defender was working on?

A. No.

Q. Did you ever ask him about any other cases that the federal public defender was working on?

A. No.

Q. Were you working on a murder case called the Lisa Dunn case where someone named Lisa Dunn was charged with murder?

MS. KARLIN: Objection. I'm not going to allow him to testify what other cases he was working on.

Q. (By Mr. Hollis) Well, let me ask you this: I think this is within the scope of the parameter. During any time that you talked with Mr. Rupp, did he ever talk to you about anything with respect to the Lisa Dunn murder case?

A. No.

MR. HOLLIS: Thank you. No further questions.

REEXAMINATION BY MR. FISCHER:

Q. I just have a couple follow-up questions. Why do you say that there was zero chance that Mr. Rupp would be a witness regarding Mr. Tobiason?

A. Because that's the framework in which the agreement that we made on the first day he provided us the information was set up. I've had cases in the past where you just make a decision early on to honor commitments or desires. And the whole time that I was dealing with Mr. Rupp, knowing his position and the fact that he was doing this on his own private time on the weekends or whatever, it really didn't concern your office with regards to the information he was providing. And so I did not want to create a conflict by having to testify and so we were honoring that and at no time did I from probably the first day on intend to use him as a witness.

The first day, I will say though, before we found out about these parameters and the comments from your office, the federal public defender's office, I had -- I mean, the first thing that an investigator wants would be, hey, shoot, let's wire them up. Let's see what we can get on tape. But once we found out that your office had a problem with any kind of witness information, we decided to honor that and I feel that we did do that.

Q. Was that information relayed to the federal public defender?

A. My boss attempted to sit down with Mr. Phillips and explain the difference if he had a question as the difference between a cooperating witness and a confidential source, and it's my understanding that Mr. Phillips declined to meet with my boss on that matter.

Q. Are you aware that that proposed meeting occurred approximately 3 1/2 months after your contact with Mr. Rupp initiated?

MR. HOLLIS: Go ahead.

A. Yes.

Q. (By Mr. Fischer) So at no time in the intervening time between June 8th and September 23rd did anyone from your office attempt to explain that to the federal public defender; is that correct?

A. No, because we didn't have a need to do that.

Q. From the FBI's perspective, you had no need to do that; correct?

A. Yes.

Q. So based on your involvement with Mr. Rupp in this investigation -- let me strike that. Based on the arrangement that you made with Mr. Rupp at the beginning of his involvement with this investigation, you were proceeding under the assumption that you would be able to continue with any investigation and potential

prosecution of Mr. Tobiason without the assistance of Mr. Rupp?

A. Yes.

Q. Therefore, he wasn't vital to the prosecution of Mr. Tobiason?

A. By -- I'm struggling with --

Q. I'll withdraw the question.

A. -- with the vital part.

Q. I'll withdraw the question.

MR. FISCHER: Nothing further.

MR. HOLLIS: Nothing further.

(The deposition concluded at 11:50 a.m.)

IN RE: Rupp vs. Phillips

Page	Line	Correction	Reason

Paul W. Vick

MAM

IN RE: Rupp vs. Phillips

____ I certify that I have read my testimony and request that NO changes be made.

____ I certify that I have read my testimony and request that the above changes be made.

_____

Paul W. Vick

Subscribed and sworn to before me this ___ day of _____, 19____

_____

Notary Public

State of _____

County of _____

My commission expires _____

MAM

CERTIFICATE

I, Myles A. Megee, a Certified Shorthand Reporter of the State of Kansas, do hereby certify:

That prior to being examined, the witness was first duly sworn;

That said testimony was taken down by me in shorthand at the time and place hereinbefore stated and was thereafter reduced to typewriting under my direction;

That the foregoing transcript is a true record of the testimony given by said witness;

That I am not a relative or employee or attorney or counsel of any of the parties or a relative or employee of such attorney or counsel or financially interested in the action.

Witness my hand and seal this 24th day of August, 1999.

Myles A. Megee
Certified Shorthand Reporter
State of Kansas

I think that's all.

Q. Are you familiar with the -- any of the Canons of Ethics that apply to lawyers?

A. No.

Q. Who did you understand your bosses to be, the people you reported to, chain of command?

A. David Phillips at first and then Cindy and then David.

Q. Do you have a recollection of the occasions in which you have sat, stood, face-to-face in person talking to David Phillips?

A. Not specifically.

Q. With regard to this Tobias situation do you have any recollection of talking to David Phillips face-to-face in person?

MR. HOLLIS: It's Tobiason.

Q. (By Mr. Rupe) I'm sorry. Tobiason.

A. No, I don't have a specific recollection of that.

Q. Do you have any recollection of talking to him on the telephone?

A. Yes.

Q. How many telephone conversations do you recall having with David Phillips over this Tobiason situation?

A. I want to say at least two.

Q. Can you time fix when those conversations were.

A. The first conversation would have been a Monday after that first gun show.

Q. Tell me what you remember about the conversation with David Phillips the Monday after the first gun show.

A. I called him up, explained what happened.

Q. Had he asked you to call him or did you call him up just to tell him what had happened?

A. I think I called him up to tell him what had happened.

Q. Okay.

A. And, you know, I was probably running on about hey, this guy is threatening to destroy a city, that kind of stuff. He can create weapons of mass destruction from things found in nature and, you know, I have talked to the FBI about him and they may want me to do something else.

Q. Did you explain to him that the something else entailed surreptitiously taping conversations with Mr. Tobiason?

A. I don't recall. I don't recall.

Q. But you did indicate in that first telephone conversation that the FBI was asking you to do something to assist them in the investigation?

A. I believe. I said they may want me to do something, what do you think or what is the deal.

Q. And what did Dave Phillips say back to you?

A. He said talk to Cindy, you know, and that's what I remember.

Q. Did he tell you he didn't think that was a wise idea or words to that effect?

A. I don't recall.

Q. You are not saying he didn't say it. You are just saying you don't remember it?

A. Exactly.

Q. Was the first conversation you had with anyone from the Federal Public Defender's Office about Tobiason that telephone conversation with Dave Phillips?

A. I don't know.

Q. I assume you don't know because you can't remember?

A. True.

Q. Is that the first conversation with anyone that you can recall is that first telephone conversation you have now described with David Phillips?

A. Yes, that's the first one I recall.

Q. When was the next conversation you recall with anybody from the Federal Public Defender's Office about Tobiason, whether the conversation was by telephone or otherwise?

A. Well, I think that is when Cindy and I talked.

Q. Tell me what you remember about that conversation. First, was it face-to-face or on the phone?

A. Phone.

Q. Tell me what you remember. Did you call her or did she call you?

A. I don't remember that.

Q. Okay. Starting at the beginning of the conversation to the end of the telephone conversation with Cindy, tell me everything you remember.

A. I remember that she kind of threatened me with my job. I remember that.

Q. Do you recall -- well, let me preface this question with this statement: Does the word "threat" to you mean if you do something then I'm going to do something? There is kind of a promised exchange in a threat?

A. It was pretty abrupt and the language and stuff, you know.

Q. Thank you for that information. My question I'm going to try to find out what she said to you that you understood to be a threat to your job. Let me ask you this question: Did she say or do something in this

telephone conversation that caused you to believe if you did something your job would be threatened?

A. Oh, boy, you can say that again. I'm sorry.

Q. Did you understand from your conversation with her that if you did something your job would be threatened?

A. Did I understand from the conversation with her that if I did something--

Q. You could lose your job.

A. I don't know if those were her exact words, but it was something like that, yes.

Q. What did she tell you you could not do or should not do?

A. I think she said be involved.

Q. Involved with what?

A. I just assumed any substantive investigation.

Q. Of Tobiason?

A. Yes.

Q. By the FBI?

A. Yes.

Q. So I'm on track then, that at some point after you talked to David Phillips he told you to talk to Cindy. You talked to Cindy on the phone. The conversation with Cindy was one where she threatened your job if you were involved in any way with the FBI investigation of Tobiason. Is that an accurate statement?

A. It's something like that.

Q. Well --

A. I don't have good recall of exact words.

Q. But you did have the understanding that if you were involved in the investigation you could lose your job?

A. I didn't think that I could lose my job over an illegal threat.

Q. Let me stop you because I don't want -- I'm not trying to -- I'm not trying to ask you at this point in the questioning what you thought about the conversation. I'm trying to find out what you remember being said in the conversation. And as I understand your testimony she said that if you were involved in any way in the investigation you could lose your job or words to that effect, true?

A. I think she said something like this: She said you can resign and go to work for the FBI. I remember that phrase.

Q. Do you recall her saying anything to the corollary of that and, that is, if you work with the FBI you can lose your job?

A. Something like that, sure. I think she may have also said your job is at risk.

Q. All right. So I'm clear, is it accurate, and now I'm going to ask you for your opinion or what you thought when you heard her talk, was it your opinion and thought that Cindy felt you cooperating with the FBI was wrong?

A. I don't know. Can you say it one more time.

Q. Sure. When you concluded the conversation with Cindy did you understand that Cindy thought your talking or cooperating with the FBI was wrong?

A. I don't know what she felt. I do know that she threatened me with my job.

Q. You have no idea why she threatened you with your job if you cooperated?

A. I didn't think it was good for her to know.

Q. Thank you for telling me about your thoughts. I'm asking you to tell me what you understood from her. Did

you have any clue that she thought that you cooperating with the FBI was wrong, whether it was lawful or unlawful? I'm asking you what she transmitted to you in the conversation.

A. She just, you know, did that job threatening thing and I don't know what she thought was right or wrong. I don't. I know she was mad. Sorry.

Q. Did you feel like after you talked to her that you could then cooperate with the FBI and keep your job?

A. Sure.

Q. So you felt after that conversation with Cindy that you had the ability to go ahead and talk to the FBI and keep your job?

A. Sure.

Q. Why did you think that? What did she say that caused you to conclude that?

A. Well, I just thought she was basically giving me an illegal directive.

Q. Did you seek legal advice when she gave you that directive of whether it was right or wrong?

A. Not then.

Q. Prior to your termination?

A. Yes.

Q. From whom?

A. Paul Vick.

Q. Is Paul Vick a lawyer?

A. FBI.

Q. Is he a lawyer?

A. Well, I don't know.

Q. Are you able to give legal advice? You, Dan Rupp, former investigator with Sedgwick County Public Defender, former investigator with the Federal Public Defender's Office, are you able to give legal advice?

A. Maybe to myself in the mirror but that's about it.

Q. Well, as I understand it you had some difficulty understanding what a conflict of interest was, true?

MR. HOLLIS: Objection. Were you finished with your question? I object. I don't think that is supported in the record. I don't think there is a question pending. I think that's argumentative.

Q. (By Mr. Rupe) Do you know what a conflict of interest is?

A. I think I have some understanding.

Q. Let's get that exhibit out we were looking at earlier. Do you have an understanding in Exhibit 3 with regard to the -- I'm sorry. Go to Exhibit 4. With regard to the canons we talked about earlier, particularly the canon on page A000245, what a conflict of interest in that context is.

A. Could you ask me that one more time. I'm sorry.

Q. Well, I kind of flippantly said to you you don't know what a conflict of interest is commenting on your testimony this morning. Your attorney objected and he said that you do know what a conflict is so I'm going back to the questioning I asked you about this morning to see if you have any different understanding of what Bates number A000245, conflict of interest means.

MR. HOLLIS: Well, I object to your reference to what I said because I don't think that's what I said, but if you can answer the question go ahead.

MR. RUPE: What you said, Counsel, was my conclusion that he didn't know what a conflict of interest was

was not supported by the record. I think it is and I'm going back there because if he is going to tell me what a conflict of interest is I dearly want to hear it.

Q. (By Mr. Rupe) Let's go back to A000245. Do you have an understanding in the context of that canon what conflict of interest means?

A. No way.

Q. And did you when you worked at the Public Defender's Office have an understanding what a conflict of interest was?

A. You know, just my personal opinions.

Q. Okay. So in terms of Canon 3 you didn't know, but in terms of your personal opinion you had a personal opinion as to what a conflict of interest was?

A. Sometimes and not in all situations. I am just not that good at it.

Q. Did you have to rely on others telling you what a conflict of interest was in order to identify one while you worked at the Public Defender's Office?

A. Sometimes.

Q. Would you have to ask questions of 16 people in order to determine whether something was a conflict of interest or not?

A. See, I wouldn't determine that. I would just inform the attorneys of that and that's their job to decide.

Q. And to tell you?

A. I don't know what they do. You know, they do whatever they want to with me.

Q. Well, tell me what your understanding without reference to the personnel policies and procedures manual are, tell me what your understanding of a conflict of interest was when you worked at the Federal PD?

A. Well, you shouldn't benefit in any way. Through a client's -- I mean I shouldn't, representation. And about all I can do is sort of like suspect a conflict of interest because I'm not a lawyer.

Q. And because you aren't a lawyer did you have to rely on lawyers to tell you what was lawful and what was unlawful?

A. Not usually.

Q. Because you knew what the law was?

A. Well, the question doesn't come up that often.

Q. Well, from what I understand when you are talking to Cindy on the telephone and she was mad at you and told you not to cooperate with the FBI or you would lose your job, the question came up, didn't it?

A. What question? Conflict of interest?

Q. Is what she is telling me lawful or unlawful.

A. Oh, yeah.

Q. It came up in your mind at that time?

A. Yeah.

Q. Did you ask her?

A. No.

Q. Did you ask any lawyer or anybody at that time whether it was lawful or unlawful for her to tell you not to cooperate with the FBI or you would lose your job?

A. I knew it was.

Q. From what source?

A. It just had to be, you know, because the threat to all those people that this guy was posing was this huge emergency that it required action on my part.

Q. So because of what he was threatening you assumed that she could not tell you not to cooperate with the FBI? Is that a fair statement?

A. I'm sorry. Could you do that one more time. I'm sorry.

Q. Because of what he was threatening, you assumed that she could not tell you not to cooperate with the FBI. You can look to your lawyer. If you want to talk to your lawyer you have to answer my question first.

A. Could you say it one more time.

Q. Is it accurate that you have assumed from the circumstances as to what Mr. Tobiason was threatening, you assumed that her instruction to you or threat to you not to cooperate with the FBI was unlawful, true?

A. I need to look at that sentence. I'm sorry. It's huge.

MR. RUPE: Would you read it back to him.

(Whereupon, the question was read by the reporter as requested.)

THE WITNESS: I just don't know. I can't answer that question. It's really convoluted and compound. You know, I can't. It would take me a while. Can I put it on the blackboard?

Q. (By Mr. Rupe) You have a piece of paper in front of you.

A. Okay.

Q. Did you assume from the circumstances Mr. Tobiason was threatening that Cindy's threat to you not to cooperate with the FBI was unlawful?

A. Yes.

Q. And you didn't ask anybody for advice as to whether it was unlawful?

A. I think I talked to Paul Vick about that.

Q. Sometime after your conversation with Cindy?

A. Right.

Q. Did you talk to any lawyer?

MR. HOLLIS: I object if you are assuming that Paul Vick is not a lawyer.

MR. RUPE: He is not a lawyer.

MR. HOLLIS: He is not?

Q. (By Mr. Rupe) Did you talk to any person asking them if Cindy's threat to you was unlawful other than Paul Vick before you were terminated?

A. Any lawyer?

Q. Any person.

A. Any person. I think I talked to Walter Markley.

Q. Anyone else beside Paul Vick and Walter Markley?

A. I don't recall.

Q. Incidentally, when you talked to David Phillips or to Cindy in that first conversation and when you told them you had told the FBI about Tobiason, did they fire you?

A. When I first contacted them?

Q. When you first contacted Dave Phillips. As I understand your testimony you had already talked to the FBI by the time you talked to David Phillips?

A. That's right.

Q. And obviously since your conversation with Cindy followed your conversation with David, by the time you talked to Cindy you had already talked to the FBI?

A. Yes.

Q. Did either Cindy or David fire you in that first telephone conversation you had with either one of them?

A. Okay. No.

Q. All right. Did Cindy or David say anything about the fact you had gone to the FBI that you remember?

A. On that day?

Q. Yes.

A. Did David or Cindy say anything else about me going to the FBI?

Q. Did they say anything about your going to the FBI, words to the effect of well, you should have gone to the FBI or words to the effect of you should have never reported that?

A. I see. David said like well, good, that's good. I sort of like talked to Cindy and I was telling him, I was mostly telling him.

Q. But when you told David that you had gone to the FBI he said good, that's good?

A. Something like that.

Q. And he didn't fire you in that phone conversation?

A. No.

Q. Do you know of any -- who is Walter Markley?

A. A private investigator in Wichita. Do you want his number?

Q. How do you know him?

A. He's a friend.

Q. What's his phone number?

A. (316) 265-1831.

Q. And did you talk to him before or after you were terminated?

A. Before.

Q. And what was the reason you were talking to him? Did you talk to him about the Tobiason matter?

A. Yes.

Q. Were you asking his advice?

A. I think I was, yes.

Q. Did you talk to him the same day that you talked to David and Cindy?

A. I don't think so. I don't think so.

Q. Incidentally did you tell David and Cindy that the FBI would want you to record a conversation with Tobiason?

A. I think it went more like this. I said I think they may want me to.

Q. Did you talk to Vick the same day you talked to Cindy and David?

A. Yes, I think.

Q. Tell me everything that Paul Vick said to you on the phone when you talked to him, what you said and what he said.

A. We had a flurry of phone calls, you know.

Q. Before or after your conversation with Cindy?

A. All during this day.

Q. Tell me what you remember about the phone calls that you had with Vick?

A. On one phone call Paul Vick asked me what I thought this guy was capable of doing on short-term notice and I told him.

Q. Did you have conversations with Vick on that day that you remember about whether Cindy's statement to you about not to cooperate was lawful or unlawful or was that at some later date?

A. I think it may have been a later date.

Q. Okay. So on that day you did not have a conversation with Paul Vick about Cindy's threat?

A. I just don't know the timing of this stuff.

Q. But your recollection is it was at a later day?

A. That's the best one I've got.

Q. When did you actually do anything for the FBI with regard to Tobiason after this phone call or flurry of phone calls with Paul Vick on the same day you talked to David and to Cindy?

A. Well, that first day Dennis from the ATF sent me up to Paul Vick's office.

Q. The same day?

A. This is the very first contact Monday morning.

Q. Was it the same day you had the conversation with David and Cindy?

A. Yes.

Q. When did you actually do anything for the FBI with regard to Tobiason after this date where you had the phone calls with Cindy and David?

A. I don't know how long after that Monday it took them to ask me to write that letter and I actually did it.

Q. Had you had the conversation with Vick when he told you that Cindy's order was not lawful before or after you wrote the letter?

A. I have no idea.

Q. Just so the record is clear, Cindy was not telling you couldn't talk to the FBI, was she? She was just telling you that if you did you couldn't work for the public defender. Wasn't that the threat? Do you want to write that one down, too?

A. No.

Q. Then give me an answer.

A. She did say you can -- something along the lines of you can continue to do this; you'll have to resign.

Q. And the conversations with David Phillips and with Cindy where were you when you talked to them?

A. I think that was my office.

Q. Had you been to the FBI before you talked to them? In other words, had you gone to the FBI?

A. Before I even went to work, yes. On the way upstairs I stopped off at ATF. They sent me to FBI and then I went to work.

Q. And made the calls to David and Cindy?

A. Yeah.

Q. And that was all the same day?

A. I think so.

Q. And it was a Monday?

A. I think so.

Q. Where is the letter that you sent to Tobiason?

A. The FBI has it. Tobiason has it.

Q. Do you have a copy of it?

A. No. The FBI does though.

Q. Did they make a copy of it before you sent it?

A. I don't remember if I made a copy and dropped it off to them. I'm sure I did. I think they asked me for a copy.

Q. Do you know if your lawyer has a copy?

MR. HOLLIS: He does not.

THE WITNESS: He doesn't.

Q. (By Mr. Rupe) Okay. When was the next time you had any conversation with anyone from the Federal Public

Defender's Office about Tobiason after these two telephone calls you had with David Phillips and Cindy on this Monday?

A. I remember talking back and forth to David and Cindy.

Q. The same day?

A. I don't know. I think so though.

Q. Tell me what you recall. How many additional phone calls do you recall with David other than the first one?

A. Maybe one, two.

Q. What do you recall about those?

A. Not much. I don't remember calling him.

Q. You just know you had telephone calls with him but you can't remember what was said?

A. I'm sorry. I don't.

Q. Did you take any notes?

A. No.

Q. Did you record the phone call?

A. No.

Q. Did you record any phone calls having to do with Tobiason?

A. No.

Q. What is your recollection of any additional phone calls you had with Cindy?

A. Well, we talked back and forth, you know, and I think she was saying, you know, like your job is at risk, report further contact, don't have any other contact, and then I had another conversation with her where I think I was protesting saying, you know, I go to gun shows, that's part of my deal. This guy is in my circle and I said what can I do and she said, you know, you can't be a witness

is the last conversation I remember and, you know, that's what I remember.

Q. Do you recall her saying anything in those flurry of conversations on that Monday or do you recall David Phillips saying anything in that flurry of conversations on that Monday about a conflict of interest?

A. I don't.

Q. Are you saying you don't remember it or are you saying it wasn't said?

A. I do not remember.

Q. Looking at the second page of Cindy's notes marked Exhibit 6 to Phillips' deposition there is a remark in Cindy's handwriting "problems, conflict now look if witness. Tell him FBI do their job, can't be working undercover and on stand testifying for FBI and work here." Do you recall anything like that from Dave Phillips or from Cindy?

A. Yes. I think that's where the witness thing comes in.

Q. So that refreshes your recollection there was some discussion along those lines?

A. What I remember is the thing about I was looking for some simple way to deal with this deal of what I could do and what I couldn't do.

Q. My question goes to the words on that page and their ability to refresh your recollection. Do those words refresh your recollection that the term "conflict" was used in the conversation you had with David or Cindy?

A. No.

Q. But you do recall someone, one of those two explaining to you that you couldn't work for the FBI undercover and be on the stand and work here? Do you remember anything like that?

A. All I remember is the witness thing.

Q. And what was it that you understood was a problem with you being a witness for the FBI?

A. I couldn't understand why there would be a problem.

Q. But you remember it was a problem to David and to Cindy?

A. Yes.

Q. And is it in your habit or custom if somebody indicates they have a problem with something to ask why they have a problem with that?

A. Not in this situation.

Q. Why? Why didn't you ask or why don't you remember asking?

A. I had a guy on one hand who was threatening to kill a lot of people. I had Cindy on the other hand threatening my job. I knew that it would be illegal for them to prevent me from helping the FBI prevent this disaster, possible disaster.

Q. And your legal opinion came from yourself?

A. Yes.

Q. The next page says conflict, et cetera, FBI, don't need you to do this. Do you recall them telling you that the FBI had other sources?

A. Yes, yes.

Q. Do you recall them telling you to think over as it indicates there, can't work, and work for FBI?

A. I can recall something like that but nothing specific.

Q. What did David Phillips say that you recall or Cindy McNorton say that you recall when you told them that it was unlawful for them to instruct you not to cooperate with the FBI?

A. Could you ask that again.

Q. Maybe I'm assuming too much. Did you tell David or Cindy that you thought it was unlawful for them to instruct you not to talk to the FBI?

A. No.

Q. Did you agree that you would not talk to the FBI when you talked to Cindy and David?

A. I think that's why I called Cindy or we called, we talked the last time was to get the parameters on that.

Q. And did you agree with her that you wouldn't talk to the FBI?

A. I don't recall.

Q. Look at the notes on A01689 dated 6-10-98. Did you say to Cindy that you really needed your job and the FBI didn't need you for this investigation?

A. I'm sure I said I really needed my job. I don't think I said they don't need me for this investigation.

Q. Did you say to her on the 10th of June that you would not cooperate with the FBI?

A. I don't recall that.

Q. Well, I'm having a hard time understanding this. You continued to work for the Federal Public Defender after this flurry of conversations with David and Cindy, right?

A. Yes.

Q. And Cindy has said to you in a previous phone call that if you talk to the FBI you were going to lose your job, right?

A. No.

Q. She didn't say that to you?

A. No. I mean talking to the FBI. That's why I was calling her back for. I didn't understand. I talk to the FBI every day it's like hi, how you doing, what's up.

Q. I'm sorry. I should have been more specific in my question. You understood that if you continued to cooperate with the FBI on the Tobiason matter you could lose your job?

A. That's not how it was left. It was left with you can't be a witness.

Q. Do you agree that Bates number A001689 says FBI doesn't need him to do this but he wants to?

MR. HOLLIS: Well, I object asking him to try and read Cindy's notes. I don't think there is any foundation for that. They are not his notes. In fact, we don't have any testimony from Cindy that they are her notes.

Q. (By Mr. Rupe) Well, do you recall her saying that -- do you recall her saying that the FBI doesn't need you to do this?

A. See, I remember David saying that but I don't remember Cindy saying that.

Q. Okay. Do you recall either David or Cindy telling you if you changed your mind you needed to let them know?

A. I don't recall that specifically.

Q. What about in quotes? The quote attributed to you "But I really, really want to do this." Did you say that to them?

A. I don't recall.

Q. What's Exhibit 2 to Phillips' deposition -- I'm sorry -- Exhibit 3. Is Exhibit 3 a September 24, 1998 letter that you wrote to David Phillips?

A. A person in Richard Ney's office, Pam McLemore, prepared this for me and I signed it and she sent it off.

Q. So somebody working on your behalf prepared the letter for you?

A. Yes.

Q. And it has your name at the top and your signature at the bottom?

A. Yes.

Q. Did you read it before you signed it?

A. I'm sure I did.

Q. Was there anything that you caused her to correct before you signed it after you read it?

A. Not that I recall.

Q. Is your recollection as you sit here today that when you read it over in her office and signed your name to it to send it off to your employer that it was truthful?

A. Yes. It seemed fine.

Q. Look at page two, the top paragraph, because I want o ask you about something you say in there. It says midway in that first paragraph "Cindy McNorton told me I could not be a witness in any way in this matter and my job would be at risk if I made myself a witness. I acknowledged that and said I would not sneak around her."

Did you say that in the letter to Mr. Phillips dated September 24?

A. Yes.

Q. Was that your intent to represent to Cindy that you weren't going to sneak around her?

A. Yes.

Q. When did you tell Cindy that you had, in fact, worn a wire -- I'm sorry -- that you had, in fact, written a letter to Tobiason?

A. Maybe September 11.

Q. Of 1998?

A. Right.

Q. What's the reason you didn't tell her when you did it?

A. I thought I had a perfect right to send a letter to this guy. I was scared to death that there was going to be a catastrophe. She had threatened my job over this deal. I have been asked by the FBI to write this letter. They said don't tell anybody.

Q. Who is "they"?

A. Paul Vick. And I knew at that time I was the only one who was talking to the guy who had any input to him at all.

Q. Did you ask Paul Vick or anyone from the FBI if Cindy before you wrote the letter? I mean as I understand your recollection, the FBI says don't tell anybody. Cindy has threatened you with your job if you cooperated with the FBI so did you say well, I need to tell my employer?

A. This was after I was writing the letter after agreeing to it? No.

Q. Why not? Why didn't you ask the FBI if you could tell Cindy?

A. After that initial threat I was afraid to say anything to her.

Q. Because you would lose your job?

A. I was afraid of losing my job.

Q. And that's why you didn't say anything, right?

A. You know, during this time Paul Vick said --

Q. You can volunteer all kinds of information in a little bit when your attorney asks you questions. My question to you is, is it right that you didn't tell Cindy that you were writing the letter because you were afraid you would lose your job?

A. That's partially true.

Q. Is there any part of that that is false?

A. It's just not everything.

Q. What's the rest of the story there to complete the answer in addition to you were afraid you would lose your job?

A. My only concern at that point was getting a handle on this possible weapons of mass destruction. Can I continue?

Q. Sure. Is your answer complete?

A. Well, I just wanted to add a little bit. It was stressful. I'm sorry. I'll just have to continue.

Q. Go ahead.

A. I just can't. I lost my train of thought.

(Whereupon, a recess was taken.)

Q. (By Mr. Rupe) Did you at any time ask Cindy McNorton what the boundaries were and what would be over the line in your communications with the FBI? I'm focusing on June 10 '98.

A. Is that the Monday?

Q. Yes.

A. I'm sorry.

Q. I'm sorry. June 10 was a Tuesday. June 9 would be Monday. On either that Monday or Tuesday did you talk to her and ask her what the boundaries were and what was over the line?

A. I don't recall that specifically but I'm almost sure I did.

Q. Do you recall her telling you that you were out of the investigation and that the FBI should be left to do their own work and that following your reporting of the incident about Tobiason you didn't need to do anything more in regard to the matter?

A. I remember something like that.

Q. Do you recall Cindy telling you to talk to her or get ahold of her in the event the FBI had any further contact with you?

A. No. All I remember is the no witness.

Q. Look at Exhibit 6 to Phillips' deposition, A01690.

A. Okay.

MR. HOLLIS: What's the question?

MR. RUPE: There isn't a question yet.

Q. (By Mr. Rupe) Have you looked at that page?

A. Yes.

Q. I want to look at the last three lines handwritten. "Told him no, let us know and we'll see how to proceed."

Do you recall Cindy saying anything to you to the effect that you need to let the Federal Public Defender's Office know and we will see how to proceed?

MR. HOLLIS: Object to the reference to a document that is not in evidence.

MR. RUPE: I'm sorry. It's Exhibit 6, the last page.

MR. HOLLIS: Same objection.

THE WITNESS: I'm sorry. I don't recall that specifically.

Q. (By Mr. Rupe) You are not saying she didn't say that; you are just saying you don't remember, right?

A. That's true.

Q. Now, between June 10, 1998 and September 10, 1998 -- let's use September 9 as our point of reference. Between June 10, 1998 and September 9, 1998 what involvement did you have with the Tobiason matter?

A. That's after the letter is --

Q. After your conversations on the phone with David and Cindy that we have talked about and before you told Cindy you had had involvement further, between those two bookends, those two dates, what involvement did you have with the Tobiason matter?

A. Say the dates one more time. I'm sorry. Please.

Q. Between June 10, 1998 --

A. And the 9th of September.

Q. September 9, 1998.

A. Paul Vick called, what's going on with your boss, did you tell your boss and I said yes. He said what did they say, you know, and I go well, they don't want me to be involved in any substantive way in this deal and he said well, do they know that, you know, people could die, that kind of thing, and I said they told me I can't be a witness. And then I said, I said something along the lines of I have to, you know, do what you ask. And he said well, sort of can you write the guy a letter and I said I'm sure that's okay. They can't fault me for that and so I kind of cranked out a letter and I told Paul Vick, I said I'm going to include a clause in here begging this guy not to act before we talk. And he said that would be fine.

Q. Are you finished with your answer?

A. Probably took them a copy of the letter.

Q. Took who a copy of the letter?

A. The FBI. There were phone calls back and forth like --

Q. Between whom?

A. Paul Vick and I about him saying things. You know this guy has drawn some attention in California, some people made a report on him. They are doing a background check on him. He has got evidently the ability to carry this stuff out. He has his house surrounded by explosive-type booby trap things. You know, more along the lines

what could he do and I told him from what I had been talking to him about that he had threatened to kill a lot of people and he wasn't specific but he mentioned several different easily made like weapons of mass destruction.

Q. So you sent the letter?

A. Yes.

Q. And did you show the letter to Cindy or to David?

A. No.

Q. Before you sent it?

A. No.

Q. Why not?

A. I didn't think it was any of their business. I had a right to correspond with the guy.

Q. You had represented to Cindy that you were not going to sneak around her in this matter and I'm kind of curious as to what your thought process was as to why you did not show the letter to Cindy?

A. At the point where Paul Vick basically said well, what do you want to do like lose this many people over this. At that point, you know, I was concerned more about the, you know, the emergency of the guy putting together something and using it.

Q. More concerned about that as opposed to what?

A. Anything.

Q. Including your job?

A. I wanted to keep my job.

Q. And that's why you didn't tell Cindy, right?

A. I did tell Cindy.

Q. No. When you wrote the letter and you had told her you wouldn't sneak around her and you didn't give her a copy of the letter or tell her you sent the letter, the reason you didn't do that was because you didn't want to get fired, right?

A. I didn't think that they could fire me.

Q. So why didn't you give her the letter?

A. I didn't want to push a big argument, you know, because she can be difficult if she holds a grudge.

Q. So I'm clear and so your answers are truthful and responsive to my questions, the reason you didn't show her the letter to Tobiason before you sent it was that you were afraid you were going to lose your job if Cindy saw it? True?

A. Can I answer that something other than yes or no?

Q. You can give me a yes or no answer since it is a yes or no question and explain your answer.

MR. HOLLIS: You can't tell him he has to answer yes or no. He can answer a question however he chooses to answer it.

THE WITNESS: There is just more things going on than my job.

Q. (By Mr. Rupe) But my question understand focuses on your job and Cindy's knowledge. Answer my question and then you can give any answer you want by way of explanation of anything else. My question focuses on your job and the information about you communicating to Tobiason and cooperating with the FBI.

MR. HOLLIS: What's the question?

Q. (By Mr. Rupe) My question is you didn't tell Cindy that you had sent the letter to Tobiason or show her a copy of the letter to Tobiason because you knew Cindy would fire you, right?

A. I knew that I was going to write him a letter because I had the right. I was going to help the FBI because I had a right and duty to do it. It would be illegal for them to fire me.

Q. And I appreciate all that comment and I appreciate your supplying me that information but that's not my question. My question is, is the reason that you did not give the letter to Cindy or tell Cindy you were sending the letter after you had told her you weren't going to sneak around on her, is the reason you didn't do that is because you were afraid she would fire you?

A. My foremost concern was the fact that she had threatened me and that she might try to hinder my involvement in stopping this catastrophe. I was also concerned about my job.

Q. Okay. Why were you concerned about your job?

A. I liked my job.

Q. Why were you concerned if she learned about the letter you would lose your job?

A. Even though I had a perfect right to do what I did, she has a temper and for me to assert my rights could just cause, you know, or let her know I was going to do that would just cause nothing but problems.

Q. If I understand what you just said about her having a temper and about her reaction at the time you wrote the Tobiason letter, you knew that your continued involvement was a problem to Cindy, true?

A. Yes.

Q. And it was a problem to her because she felt and expressed to you that you shouldn't be doing it, right?

A. I don't know what she meant.

Q. She had expressed to you that you shouldn't be doing it?

A. That is true.

Q. And do you have any information for this court or jury as to why Cindy thought you shouldn't be doing it?

A. No.

Q. Only Cindy can answer that question, right?

A. Why she felt I shouldn't be doing it?

Q. Right.

A. Yes.

Q. Did you ever talk to David about why Cindy thought you shouldn't be doing it? Did you ever go to her boss and say David, Cindy thinks I shouldn't be doing this; I think I have an absolute legal right to do it, what do you think?

A. No.

Q. Why didn't you?

A. I didn't need to.

Q. Why?

A. Just write him a letter, talk to him. Write or talk to the FBI.

Q. Other than the letter did you have any other involvement in the Tobiason matter before you talked to Sharon Aldridge on September 9 or 10?

A. I got a letter back, a return.

Q. Do you have that letter?

A. No.

Q. Tobiason wrote you back?

A. Right. That letter to Agent Duke Earl.

Q. Did you attempt to attend a gun show where Tobiason was there in September of '98?

A. Yes.

Q. Was he there?

A. Yes.

Q. But before you went to the gun show did you have a conversation with Sharon Aldridge about going to the gun show?

A. Yes.

Q. Who was Sharon Aldridge?

A. Paralegal. She offices right next to me.

Q. Friend?

A. Friend.

Q. Did you tell her that you were going to the gun show at the request of the FBI?

A. I said I was going to do a favor for the FBI.

Q. Did she tell you you better tell Cindy?

A. Yes.

Q. And you called Cindy?

A. Yes.

Q. And what did you tell Cindy when you called her?

A. I said something along the lines of like, you know, Cindy, I sent a letter to that guy. I got a letter back. The FBI wants to know if I go to that gun show and if Tobiason is there, what his state of mind is. And that would be -- would be sort of like the end of my involvement.

Q. Had the FBI said that, that once you went to the gun show and assessed his demeanor or attitude that you should turn the matter over to them?

A. I had already turned it over to them.

Q. Do you know if they were doing any investigation other than through you?

A. Yes.

Q. They were?

A. Yes.

Q. What were they doing?

A. I think they may have done some background checks and I assume at least a drive by of his house and some things like that. Maybe a little surveillance.

Q. Had you talked to the FBI about any witness protection?

A. You know, I don't recall that. I think someone else might have said that and said well, you will have to go to the witness protection program or something. I go I don't know because I wouldn't go in the witness protection program.

Q. Did you tell Cindy you were violating your agreement with the FBI by talking to her?

A. I don't recall.

Q. At the time you talked to her did you feel like you were violating your agreement with the FBI?

A. I don't know what I felt at that time. It was stressful.

Q. Her notes on Exhibit 6 to Phillips' deposition at the bottom says "He was violating agreement with them by even telling me this."

A. Could be.

Q. You are just saying you don't have a recollection of that?

A. Not specifically now, you know. It's like --

Q. Does reading that refresh your recollection that there was some discussion about your living up to the agreement with the FBI and what affect talking to Cindy would have on that?

A. I don't have a good recollection of that. I'm sorry.

Q. Did you tell Cindy you were going to go to the gun show?

A. I don't know if I told her I'm planning to go, I'm going. I think I told her I'm going.

Q. Well, let's avoid what you think or suppose or assume and concentrate on what you remember. Do you recall telling her you were going to the gun show?

A. Yes.

Q. Had you told her how many times you had met with the FBI during the course of the summer?

A. I don't know. I don't know if she asked me that. I would have told her if she asked.

Q. Sure. With regard to Phillips Exhibit 6 there is a mention on the last page of five, six more times this summer. Is that consistent with how many times you had talked to the FBI?

A. Sure.

Q. So Cindy had to get that information either from you or the FBI I assume?

A. I don't know.

Q. And on the following Monday did you have a meeting with Cindy?

A. No.

Q. And were you asked to sign this --

(Whereupon, Rupp Deposition Exhibit 5 was marked by the reporter for identification.)

Q. (By Mr. Rupe) -- this letter I have marked Rupp Exhibit 5?

A. Yes.

MR. HOLLIS: When you reach a point can we take a break.

MR. RUPE: I'm kind of getting into a new area so that's okay.

MR. HOLLIS: Okay.

(Whereupon, a recess was taken.)

Q. (By Mr. Rupe) We are now back on the record and I want to draw your attention to September 14, 1998 and that meeting that you had with Cindy. Was David there?

A. Yes.

Q. All right. Did David tell you that because you had continued to participate in the FBI investigation you should resign?

A. I remember the exact words we have no choice but to terminate you.

Q. Did you understand why from his comment?

A. And I don't remember. I mean I understood something but I don't remember what it was. He said something and then he said and we have no choice but to terminate you, we can't trust you and then I said --

Q. I'm sorry. Let me interrupt you. Did he say words to the effect that you couldn't be trusted with confidential information?

A. All I remember is we can't trust you.

Q. Okay. Trust you to do that?

A. Just trust me I guess.

Q. Did he tell you that your position as an investigator was one that required a high degree of trust?

A. I don't recall.

Q. You knew that, didn't you?

A. Sure.

Q. You had access to confidential and sensitive material in your job as you investigated matters, didn't you?

A. Yes.

Q. Do you recall him referring to these canons that I've talked about during the course of the deposition at this meeting?

A. No, I don't.

Q. Do you recall him telling you the reasons for your termination?

A. He did say something. I mean there is more than what I have said, but I don't recall it specifically because, you know, it's definitely a shock.

Q. Did he talk to you about integrity? Mention those words that you recall?

A. Not that I recall.

Q. Did he tell you that he felt that you had not observed high standards of conduct or words to that effect that you recall?

A. I don't.

Q. Did he tell you that it was a problem that you had not reported to Cindy your further contact with the FBI?

A. I don't know specifically if he said that. He could have.

Q. Do you recall if he mentioned the phrase conflict of interest?

A. No. I do remember him saying though that he knew this guy would be our client.

Q. I'm going to hand you Phillips Exhibit 1 and ask you if you received that letter shortly after it was written?

A. Yes.

Q. Where did you receive it?

A. This one it must have come to my apartment.

MR. HOLLIS: Do you have the original of that so we have a better copy at some point?

MR. RUPE: We will check. Off the record.

(Whereupon, a discussion was held off the record.)

Q. (By Mr. Rupe) Would you take a minute and review Exhibit 1 and I don't want you to identify things you cannot remember, but I do want you to identify things that from your recollection are just not true. So what in that letter is absolutely inconsistent with your recollection and would cause you to say they are not true?

A. It says I tendered my resignation and I was forced to resign. I never agreed to wear a wire. We talked about it.

Q. Okay.

A. I never considered my conversations with anybody to be an undercover participation in an investigation.

Q. Did Tobiason know you worked for the Federal Public Defender?

A. Yes.

Q. Did he know you were cooperating with the FBI?

A. No, not that I know of.

Q. Did you volunteer that information to him at any time?

A. No.

Q. Did he ever ask you if you were working for a law enforcement agency?

A. I don't think he did. At the top of the second page it says these meetings were to culminate in a planned contact. I don't know how accurate that is. It's like I was going to the gun show. I didn't know if he would be there or not.

Q. Okay.

A. When you get into the stuff like your action constitutes a breach of trust, am I supposed to disagree with that? That's his judgment.

Q. Yes. If you recall that being said in your meeting, and I think you do, I understand you take issue with that, but leave it to the fact that it was said by David. What I'm looking for is anything in there that you think is factually untrue.

A. Are you going to let me say that by assisting the FBI on office time was not proper and professional?

Q. Did he tell you that in the meeting?

A. I do not remember.

Q. Okay.

A. Okay. So this is everything that is sort of being discussed in that last meeting by him?

Q. Yes. And what I'm looking for is what you --

A. Blatant that I disagree with as being --

Q. Factually incorrect.

A. All right. The things I have told you I disagree with, I have those down. As to what was discussed, you know, final meeting, I don't know if all this stuff was discussed. I remember, you know, some of it.

Q. Did you have any other meetings with Phillips, McNorton other than this meeting that occurred on September 14, 1998 about your termination?

A. Richard Ney and I went to their office.

Q. That would have been on what date?

A. Sorry. I don't have it. There should be a reference to the date some place.

Q. 30th of September. Is that consistent with your recollection?

A. Sounds good.

Q. Incidentally in that meeting on the 14th did you say you understood and you would resign?

A. I remember saying I would resign.

Q. Did you say the following, and I'm going to put quotes around what is attributed to you and my question is did you say this or words to this effect: "I know you guys told me not to be doing this kind of stuff, but I just felt like if they asked me to do something I couldn't say no."

A. See, the first part, no, but the second part, and I mean I just don't recall. The second part about I couldn't say no, I was -- I was telling him how dangerous this guy is and the guy was threatening, you know, to kill a million people.

Q. Did you contact Richard Ney before or after your termination?

A. After.

Q. And did you or Mr. Ney record the hearing with David where you attempted to get your job back?

A. Not that I know of and I seriously doubt it.

Q. Who was present for the hearing?

A. Richard Ney, myself, David Phillips, Cindy McNorton, Charles Dedman.

Q. Do you recall conflict of interest being discussed at the hearing on September 30?

A. You know, all I remember Richard spoke.

Q. Let me ask you the question this way: Do you have a recollection of what was said at that hearing on September 30, 1998?

A. Yes.

Q. Tell me everything you remember being said and by whom.

A. Richard was virtually the only one who spoke and he was saying Dan was afraid that this guy was going to, you know, use weapons of mass destruction. He felt like he had to act, that sort of thing. Then he said please look at these books. You should look at these books, it's scary stuff. He said something along the lines of yeah, it's one thing to I think tell someone they can't go to a certain church or something, but it doesn't mean that you have to, you know, and I think he made some reference to a crime happening. You know, you can report it and help the police.

Q. Anything else you remember about the hearing on September 30?

A. He asked them to please consider rehiring me before things went to a point where, you know, there was a lawsuit or something.

Q. Anything else you remember?

A. He does say I had a right to free speech and to use that right to mail a letter. Also that he tried to explain -- he goes what did the guy do. It's like he writes a letter. You know, he meets with the guy once, twice, three times and he was done. I think he said something like that.

Q. Anything else you remember?

A. Boy. Oh. He said, you know, I don't know if he said, you know, like the -- that they had said this would be worse than Oklahoma City or not in there. I don't know. That Tobiason had said that.

Q. Anything else you remember about the September 30, 1998 conversation in the hearing with David Phillips?

A. He just said I had an absolute right to do what I did.

Q. Anything else you remember?

A. I can't.

Q. Do you recall anything David Phillips said?

A. See, I don't think they spoke much at all other than, you know --

Q. I understand that from your previous answer. My question is do you remember anything they said?

A. No.

Q. On September 9 and 10 and I think it's September 10 where there was a flurry of telephone calls among you, Cindy and David. Do you recall that testimony?

A. Yes.

Q. And I think that was your word flurry of phone calls. What I want to know is who else in the office of the Federal Public Defender knew that this stuff was going on with regard to you and the FBI and this Tobiason character? Did Mr. Dedman have any knowledge of what was going on at that time?

A. I don't know.

Q. I'm sorry. I said September. I am focusing on -- I misspoke. I'm focusing on June 9 and 10 '98.

A. Okay.

Q. That was the flurry of phone calls?

A. Yes.

Q. All right. Now, let me re-focus you because I have cleaned up my questioning on my date. In June other than Dave Phillips, Cindy McNorton, you, who else within the office knew about this situation with Tobiason?

A. Besides me, Cindy and David?

Q. Right.

A. I don't know. You know, I could have talked to just about anybody.

Q. Well, do you have a recollection of talking to others?

A. No.

Q. Your office is next door to Sharon. Do you know if Sharon had any knowledge of what was going on either because she overheard it --

A. I just don't recall.

Q. What about Dedman?

A. That day?

Q. Yes.

A. I don't know.

Q. June 9 and 10.

A. Not that I know of.

Q. What about later before your termination? Who in the Public Defender's Office knew about this situation? Obviously Sharon because you talked to her about it, right?

A. On that last Friday?

Q. Right.

A. Yeah.

Q. Did Dedman have any knowledge?

A. And I don't recall talking to him about it.

Q. Thank you for that information. My question was --

A. Oh, sorry. I don't know.

Q. Okay. So you don't know whether he had any knowledge or not?

A. I just don't -- I don't recall him talking about that.

Q. Your attorney listed as people with knowledge within the Federal Public Defender's Office: David Phillips, Cindy McNorton, Charles Dedman, Becky Willis and Nika Cummings?

MR. HOLLIS: Knowledge of what?

MR. RUPE: Knowledge regarding plaintiff's hiring, job performance, termination and/or allegations contained in plaintiff's complaint.

Q. (By Mr. Rupe) Do you have any reason -- strike that. Do you know what Mr. Dedman knows?

A. He was there at the termination hearing.

Q. Did you talk to Dedman at the meeting in Kansas City?

A. I don't remember when that was.

Q. In June of '98.

MR. HOLLIS: Could you repeat it, please.

Q. (By Mr. Rupe) Did you have an office meeting in June of 1998 in which Charles Dedman was present?

A. I don't remember the date. We did have an office meeting and he was present and I'm sure we talked.

Q. And was that any of the meetings that you and I have t alked about or was that some other meeting?

A. I'm not sure but I think that might refer to our annual sort of staff meeting.

Q. Okay. With regard to the annual staff meeting did Mr. Dedman say anything to you that caused you to conclude he had some knowledge?

A. I can't recall anything.

Q. Have you had any conversation with Dedman at any time that has caused you to conclude that he has some knowledge about your hearing, job performance, termination or allegations contained in your complaint?

A. Yes. He said he was sorry at the termination and he would have been present at a meeting of attorneys at the staff meeting. And I later talked to someone, him, Tim Henry, I don't remember which one, and we could hear laughter outside and I asked him later what the laughter was about and he said we were laughing at your involvement with this FBI deal. And I think that's what it refers to.

Q. But you don't know whether that came from Dedman or Tim Henry or somebody else?

A. I don't remember.

Q. Were you present when there was laughter?

A. Yes.

Q. Okay.

A. I mean in another room because they go off and have their meeting and then other staff has their meetings.

Q. Is that when you were still employed with the public defender?

A. Yes.

Q. What about Becky Willis? Do you have knowledge of what her knowledge is about this matter?

A. I can't think of anything right now.

Q. What about Nika Cummings?

A. Nika Cummings is a friend of mine. She is not in the office.

Q. Was she in the office at the time of your termination?

A. No.

Q. Was she employed in that time frame?

A. Not with the Public Defender's Office.

Q. Any knowledge that she has about your termination would that have come from you?

A. Yes.

Q. Do you know if she has any knowledge from conversations with anybody else in the Federal Public Defender's Office about your termination or about your situation with the FBI?

A. I don't know.

Q. Who is Sharon Aldridge?

A. She is the paralegal who was right next door to me.

Q. Who is Debbie Bergman?

A. The computer tech in the office.

Q. Do you have knowledge of what her knowledge is about any of this?

A. No.

Q. J.D. Blackman?

A. That's my doctor.

Q. Okay. Doug Copeland, that's your expert on damages. Does Steve Gradert have any knowledge of your termination or the circumstances involving your termination?

A. Yes.

Q. What's the source of his knowledge to your knowledge?

A. I told him after I was fired that I was thinking about suicide. And the day that David and he came down we had lunch and he said something along the lines of, you know, those guys are coming down and I go well, they are not coming down to fire me because I talked to the FBI.

Q. I'm sorry. Was that a question to him?

A. No. I was just talking to him.

Q. And you said I hope they are not coming down to fire me because I talked to the FBI? Is that what you told him at lunch?

A. Uh-huh.

Q. Is your answer yes?

A. Yes. I'm sorry. And I said something like well, they can't do that. I think I'm fine. And then I was joking with them and I go, of course, you know, Steve, I will have to tell them you were with me at that gun show and he almost dropped his sandwich.

Q. Was Steve with you at the gun show?

A. No.

Q. Who is Merri Hagle?

A. The officer manager.

Q. Did she have knowledge of your contact with the FBI?

A. I don't know.

Q. Do you have any knowledge what her knowledge is?

A. No.

Q. How about Beth Two Hatchet?

A. She was just there when they were hustling me out the door.

Q. Does she have knowledge of anything to your knowledge other than she was there when you were terminated?

A. I told her I was thinking about – I was feeling suicidal about the deal at some point and she said don't waste your money on attorneys.

Q. You say to her you are feeling suicidal and she says back to you don't waste your money on lawyers?

A. I also told her I was thinking about filing a lawsuit.

Q. You said you were suicidal and you were thinking about suing?

A. I think so.

Q. Who is Tim Henry?

A. He's an attorney in the office.

Q. Does he have knowledge of any of this?

A. I don't -- I can't think of anything right now other than what I have mentioned.

Q. Who is Walter Markley?

A. He is that private investigator I was telling you about earlier.

Q. Deb Ross?

A. She is an employee I think in Kansas City.

Q. Does she have any knowledge of the situation to your knowledge?

A. I got a call from her that was kind of strange on that last Friday.

Q. Tell me about the call you received from Deb Ross.

A. It was Dan, have a happy birthday and be in the office bright eyed and bushy tailed on Monday.

Q. And that was on what date?

A. Friday the 10th.

Q. Of September?

A. I think so. No. I think it was the Friday.

Q. Is your birthday around there somewhere?

A. That weekend.

Q. What is your birthdate?

A. 13th.

Q. What about Richard Seaton, an attorney in Manhattan? Does he have knowledge of this?

A. Yes.

Q. Was he present at any of these gun shows?

A. Yes.

Q. To your knowledge what's his knowledge?

A. Some of the comments made by Tobiason and then my immediate concern on our way home.

Q. Who is Bill Seck?

A. The agent in charge in Wichita FBI.

Q. Who is Jackie Templeton?

A. Secretary in the Wichita office.

Q. What knowledge does she have to your knowledge?

A. I don't know.

Q. How is your mental health today?

A. Okay.

Q. Where have you been employed since the Federal Public Defender's Office?

A. State Board of Indigents Defense. Did some private case work for them.

Q. Is this the --

A. Public defender, the main organization of the State Public Defender's Office.

Q. Who is your supervisor?

A. I was just working.

Q. Contract?

A. Yes.

Q. Any other employment you have had since leaving the Federal Public Defender's Office?

A. I did a security consultantcy on an emergency basis for Tim Moore.

Q. What was that about?

A. He had a big client Collins. They build busses and stuff. They were very worried about an employee who had just been terminated or left or something and she was like stalking some of the employees and they were or Tim had called both Walter Markley and myself at different times trying to get somebody to help him with this. It turned out that Walter and I were both out of town together and when we returned we both answered his phone call, showed up at his office and helped him out with that deal.

Q. Where have you attempted to find work since the Federal Public Defender's Office?

A. I sent in an application to the International Criminal Tribunal for the former Yugoslavia. It's a UN thing. They hunt down war criminals and prosecute them.

I looked into a police monitor job in Bosnia. The guy hat I replaced here in Olathe went there and I inquired into that with--what's the company's name -- it's a private contractor for the state.

And I was talking to Detective Dan Tennis of the Shawnee Police Department I believe about a job that he had mentioned kind of escorting water trucks in Somalia and that's all I can recall right now.

Q. What is your current job?

A. Investigator to Johnson County Public Defender's Office.

Q. And when did you start that employment?

A. I think that was December 14.

Q. Of '98?

A. '8.

Q. What was your pay or what is your pay today?

A. I know it started off about 26,000, 25 and it's going up. It has gone up a little bit. I have a review coming and then there is going to be a raise also and I just don't know how all that stuff is.

Q. When do you expect the review and the raise?

A. I got my -- I got my review and I think the raise starts -- it was unexpected to me. I think it starts this next pay period. Some of it anyway.

Q. Look at Exhibit 1 again if you would to Phillips' deposition and look at the second page of that letter and do you see midway the first full paragraph, the second paragraph starts with your action constitutes breach of trust.

A. Yes.

Q. Okay. And then it cites Canon 1, Canon 2, Canon 3(a) and (b), Canon 3(f) and four stated reasons. Do you see that?

A. Yes.

Q. Now, for the purposes of my question I want you to assume with me that what appears on the second page of this correspondence as explained by David Phillips yesterday in his deposition are the reasons that you were terminated.

A. Okay.

Q. Do you have any information for this court or jury that those reasons testified to by David Phillips and as listed on the second page of Phillips Exhibit 1 was not what he was thinking when he fired you?

A. Those are not what -- are not what he was talking about when he fired me?

Q. What he was thinking?

A. I have no idea what he was thinking.

Q. So your answer is you don't have any additional information or any information to supply the court and jury as to what David Phillips was thinking at the time he fired you, true?

A. No. At that point I tried to explain, you know, about the fact that this guy's activities were so dangerous and so emergent, you know --

Q. What I'm looking for is does the term "motive" have a meaning to you as a criminal investigator?

A. Yes.

Q. What I want to do is look at Dave Phillips' state of mind on the day he terminated you and when he drafted this letter dated September 18 marked Exhibit 1 to his deposition.

A. Uh-huh.

Q. Do you have any information for the court or jury that the reasons his motivation in terminating you was anything other than that outlined on the first full paragraph on the second page of Exhibit 1?

A. I think I understand your question. Like do I have any other information than this, other reasons why he would fire me other than this?

Q. Right.

A. Yes. He said in an earlier letter and you could tell that he was really mad where it says without consulting this office first you took these manuals to the FBI. You know, like I wouldn't have a right to do that.

Q. Let's identify that earlier correspondence that you make reference to. Please provide that to me.

A. I don't know if this is the same one we are looking at here, but you can see right here where he says --

Q. Okay. You are looking at the first page of Phillips Exhibit 1.

A. Yes.

Q. And tell me where you are talking about it says presented the manuals without consulting --

A. The second sentence of the second paragraph. You advised us in June and prior to notifying anyone in this agency you had provided the FBI with information about the activities of a certain individual you believe to be potentially dangerous.

Q. Well, let's take that sentence. Is that a true statement that you, Dan Rupp, advised us, the Federal Public Defender in June, that prior to notifying anyone in this agency, meaning the Federal Public Defender's Office, you Dan Rupp had notified the FBI with information about the activities of a certain individual you believe to be potentially dangerous. Is that a true statement?

A. Yes.

Q. What other information do you have to supply the court or jury that David Phillips stated reasons on page two and as he explained -- and your attorney is pointing out something to you so I don't know if I can ask you a question and you can watch what your attorney is pointing to at the same time. Are you able to do that?

A. No.

Q. Okay. Other than the reasons stated on page two, the first full paragraph there, and other than what you have indicated on the first page of Phillips Exhibit 1, do you have any other information to give this court or jury as to

what David Phillips was thinking when he terminated your employment?

A. I don't know what he was thinking.

Q. Is your answer then that you don't have any additional information other than what we have indicated in this Phillips Exhibit 1?

A. I felt like I had a right as a citizen to act the way I did.

Q. I'm not talking about what you felt. I'm talking about his thought process and what he was motivated to do by way of your termination. Do you have any additional evidence other than what we have covered in Exhibit 1?

A. I can't think of anything.

MR. RUPE: Let's take a few minutes if we could and probably wrap it up pretty quick.

(Whereupon, a recess was taken.)

Q. (By Mr. Rupe) Regardless of who said it to you, do you agree or disagree that in June of 1998 someone from the Federal Public Defender's Office whether it be Cindy or David, somebody told you that the FBI had other people that could do an investigation for them other than you?

A. They did.

Q. Do you remember which one it was, Cindy or --

A. I know Dave said it.

Q. And again regardless of who said it in June of 1998 did you understand that if you were to have any other involvement with the FBI you needed to let Cindy or David or somebody on the Federal Public Defender's Office know?

A. They told me. In trouble. Well, I'm sorry.

Q. They told you you would be in trouble if you did so and you knew you were --

A. If I cooperated with them.

Q. So you knew that you would be in trouble if you cooperated with the FBI in June of 1998, June 9 or 10, true?

A. With the reservation about that last conversation with Cindy about the witness and the witness thing.

Q. What do you mean with the reservation about that last conversation with Cindy?

A. Well, they said that first and then the last conversation I had with Cindy I said what's the deal, what can I do, what can I not do? She said don't be a witness. At first they said if -- you know, like don't -- don't cooperate with the FBI.

Q. In June of 1998 did you have discussions with anyone from the Federal Public Defender's Office that you were about to write a letter to Tobiason?

A. I don't recall.

Q. Did the FBI help you draft the letter to Tobiason?

A. They said write him a letter if you can or please write him a letter. Find out, you know, when he may be back.

Q. And this is the letter that you wrote -- that he wrote a response to, he being Tobiason?

A. Yes. There were other things included in my letter though.

Q. Did the FBI suggest anything that you should put in your letter to Tobiason other than what you have just indicated, find out when he is going to be back?

A. No. I think they said whatever is scheduled.

Q. And when did you have the conversation with the FBI about sending the letter in relationship to June 9 and 10, 1998? After that?

A. After like the first contact with the FBI?

Q. Yes.

A. I don't know. It could be a day. It could be a week down the road. I just don't know.

Q. When in relationship to the conversations with Cindy and David?

A. I think most of those were first day, second day.

Q. And your conversations about the letter were after your conversations with Cindy and David? Your conversations with the FBI in which it was decided that you would send a letter to Tobiason occurred after your conversations with Cindy and David, true?

A. I had continuing conversations. We could have talked about the letter.

Q. I don't want to know what could have happened, what might have happened, what maybe happened. I'm looking for your recollection.

Is your recollection that the matter pertaining to the letter occurred after your conversations with Cindy and David?

A. Writing the letter came after?

Q. Yes.

A. I had some conversations with Cindy and David, you know. Then I had some conversations with Vick asking me what can you do. Can I write the letter. I think this is the proper order and then I had more conversations with David and Cindy I'm sure.

Q. So the conversations about the letter occurred during the flurry of conversations on June 9 and 10 with Cindy and David, true?

A. Conversations about --

Q. Conversations about you drafting a letter that you had with the FBI occurred on June 9 and 10 during this flurry

of conversations with Cindy and David? Is that your recollection?

A. I think so, yes.

Q. All right. So during the flurry of conversations you had with Cindy and David you had conversations with the FBI about the letter, true?

A. I think so.

Q. Do you have a recollection as you sit here today what Cindy or David told you about writing that letter?

A. No.

Q. When a law enforcement officer detective type pretends to be something he or she is not, for example, gaining the confidence of somebody who is involved in drugs, is that undercover work? Is that what that means?

A. Don't they have to pretend they are someone else?

Q. That's what I mean. Isn't that what undercover work is?

A. I think that usually entails a false identity.

Q. So that is a situation where somebody does undercover work?

A. I think so.

Q. They don't say they are with law enforcement but they pretend to be somebody else?

A. I think they have to pretend they are somebody else.

Q. Are there any law enforcement agencies in your experience that have people that don't pretend to be somebody else but are simply working for the law enforcement agency and don't disclose that?

A. Everybody I know who does that gets issued a fake driver's license.

Q. Well, what about if I am charged with a crime drug wise and I agree to cooperate with the law enforcement

agency and wear a wire to capture the person that I buy my drugs from. Have those situations ever happened in your experience where the person doesn't assume a fake identity, just does not disclose that he or she works for law enforcement? Has that happened?

A. I don't know. I'm sure it has.

Q. Is that any less undercover work when somebody just keeps from the suspect the fact they are working for the police?

A. I don't know.

Q. Can those people become witnesses that do that sort of thing?

A. Sometimes, not always.

Q. You would agree with me that at the time you sent the letter and cooperated with the FBI there was a possibility that you could be a witness against Mr. Tobiason at some later time, true?

A. No. They told me I would not.

Q. Well, I'm not asking what they told you. I'm asking what you understood based on your years of experience as an investigator. You knew there was that possibility, didn't you?

A. I don't know. They told me it won't -- you are a confidential source rather than a confidential informant.

Q. My question doesn't go as to whether you would be a witness or not. My question goes to your understanding based on your years of experience first in the Sedgwick County Public Defender's Office and then the Federal Public Defender's Office. My question is based on your experience you knew at the time you began cooperating that there was the possibility you could be a witness, true?

A. I just don't know. I had no intention of being.

Q. I don't want to know what your intention was. I don't want to know what they told you. I want to know based on your years of experience when you begin a process of investigation and cooperating with the FBI you knew the possibility existed that you could be a witness, true?

A. What if I refused to be a witness? They can't make you be a witness.

Q. Now, come on. You know they can make you be a witness by subpoena, can't they?

A. I mean contempt is an avenue that several people have taken.

Q. Let's get beyond the dialogue of what it is and I'm just asking you based on your years of experience did you understand at that time there was the possibility that you could be a witness?

A. No.

Q. Because you didn't know whether you could be a witness?

A. Didn't want to be a witness at the time.

Q. I appreciate your information what you wanted and what you desired. My question goes to the possibility. When you wrote the letter to Tobiason and he wrote you a letter back did you have an understanding that could put you in the possible witness category?

A. No. They said no.

Q. And what did David Phillips say when you told him that you were going to send this letter and that you would not be a witness? Did he agree that you would not be a witness?

A. I don't recall. I don't recall.

Q. Do you have any recollection of telling Phillips you were going to write a letter?

A. I could have. I could have told him they want me to write a letter but I don't have a --

Q. I don't want to talk about what could have been or what might have been. Do you have a recollection of telling Phillips you were going to write a letter?

A. I don't.

Q. The same question with regards to McNorton. Did you tell her?

A. I don't recall.

Q. Do you agree with this statement in the complaint that you filed, paragraph 41. "Rupp wrote a single letter to Tobiason in mid June, 1998"?

A. Yes.

Q. Did you request in that letter a catalog of more recent books?

A. Yes.

Q. Did you explain to him there were some positive alternatives to Tobiason's problems with the government?

A. Yes.

Q. When you read Tobiason's response at the end of June, 1998 and he said "I have already decided an effective and quite appropriate solution to both the justice system and government's actions, thanks anyway, will you be at the show eleven thirteen, September"? When you read that did you think there was a possibility you might be a witness?

A. No. It never occurred to me.

Q. So you didn't think the letter was important that you got from Tobiason?

A. Sure, yes.

Q. Sure, you thought it was important or sure, you didn't think it was important?

A. I thought it was important.

Q. In fact, you turned it right over to the FBI?

A. That's true.

Q. Did you collect unemployment --

A. No.

Q. -- after your employment with the Federal Public Defender's Office?

A. No.

Q. And is there a reason you did not?

A. Well, I was in really bad shape for a while after this and I was not up to going out there. I have savings. I had ways to make money. E.J. Greenup called me up almost immediately and said come on, let's go and do some cases.

Q. And did you work for him on an interim basis?

A. That's with the bid stuff.

Q. So the reason you didn't seek unemployment is because you were employed or doing work?

A. Yes, kind of got right into it.

MR. RUPE: That's all the questions I have. I would ask that he read and sign.

MR. HOLLIS: I have just a few questions. Can you mark that, please.

(Whereupon, Rupp Deposition Exhibit 6 was marked by the reporter for identification.)

EXAMINATION

BY MR. HOLLIS:

Q. I'm showing you Rupp Exhibit 6 which is just a better copy of Phillips Exhibit 1. It's not a fax copy. Looking at the second paragraph on page two do you believe that those are reasons why Mr. Phillips decided to terminate you?

A. No.

Q. What are the reasons for the termination you think why you believe he terminated you?

A. For helping the FBI.

Q. And what evidence do you have of that?

A. He says that in his letter.

Q. Where does it say that?

A. It says you were told you cannot continue active undercover participation in the investigation of the suspect. You chose to continue with your undercover work with the FBI. You were given the choice of resigning at that time if you chose to continue undercover work with the FBI.

Q. Okay. Has the termination of your employment -- how is your mental health today?

MR. RUPE: Objection. Asked and answered. I asked him that and he said okay. I'm sorry. I'll not give a speaking objection.

Q. (By Mr. Hollis) Have you thought more about that answer?

A. Yes.

Q. What thought do you have at this point?

A. I thought that was a reference to are you okay to go ahead, you know, can you see this stuff, understand this stuff, but I mean just from my own kind of assessment of my mental health.

Q. What is your assessment of your mental health today?

A. It's been off and on suicidal since the firing.

MR. HOLLIS: I have no further questions.

MR. RUPE: No further questions.

(Whereupon, the deposition adjourned at 5:30 p.m.)

_____

K. DANIEL RUPP

Subscribed and Sworn to
before me this _____ day of
_____, 1999.

_____

Notary Public

County of _____

State of _____

F-1

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

K. Daniel Rupp,

Plaintiff,

vs.

David J. Phillips, in his personal capacity,

Defendant

Case No.: 99 2101 6TV

COMPLAINT AND DEMAND FOR JURY TRIAL

Introduction

1) K Daniel Rupp ("Plaintiff") brings this action against David J. Phillips ("Defendant"), in his personal capacity, for deprivation of his rights under the First Amendment of the United States Constitution.

2) The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1331 in that this *Bivens* action arises directly under First Amendment to the United States Constitution.

3) Venue is proper because Defendant resides in this district and a substantial part of the events or omissions giving rise to the claim occurred in this district.

4) Rupp began employment as an investigator in Wichita with the Office of the Federal Public Defender for the District of Kansas on 12-26-94.

5) Rupp was an exemplary employee throughout his employment.

6) Plaintiff's supervisor was Cindy McNorton, who reported to David Phillips, the Federal Public Defender for the District of Kansas.

Rupp's First Meeting With Timothy Tobiason

7) Rupp was and is an avid gun collector and frequented area gun shows in his spare time.

8) The gun shows featured vendors with booth displays. Rupp became acquainted with Timothy Tobiason—one of the vendors—in early to mid 1997.

9) Tobiason was a vendor who was selling books and manuals related to various types of improvised warfare and home defense, including the design and manufacture of biological and chemical weapons of mass destruction.

10) Tobiason was selling a set of books in a series entitled "Scientific Principles of Improvised Warfare and Home Defense. When they first met in 1997, Tobiason was selling a manual entitled "*Military Phosphorus Chemical Weapons and Nerve Agents—Advanced Chemical Weapons Design and Manufacture—Chemicals that kill in 30 seconds or less (or your next book is free). See* Exhibit 1.

11) The manual began with the admonition, "If there is one good reason to teach every living soul on the entire planet how to make nerve gas, it would be the mere existence of lawyers."

12) The manual described in great detail how to make nerve gases, including sarin.

13) The end of the manual concluded with this statement:

A few days ago, I was traveling to a gun show and became stuck in a traffic jam in Chattanooga. They had funneled four lanes of traffic into one for major replacement of part of the interstate. It was hot and humid, and I had no air conditioning, and my patience had reached its end so I became Darwinian in my thinking. I finally decided that if they ask me why I wrote this book I would tell them "to reduce traffic congestion." You see. I can still use humor to fight back.

In the end, Washington and all the state governments need to know that they cannot simply write laws and expect to control and regulate all of the people and their lives. The people can in fact, finally refuse to obey and live by their rules any longer. The power of the government to send masked police, or even the army into peoples homes, has up to this point in time given them the power to impose their rules on everyone. Their (sic) is only one way to balance this power and that is to make sure that the citizens have such knowledge in their possession that the power of the police and the army effectively becomes irrelevant. On that day, this government will have to find new rules that are in fact just for everyone, not just the ones who fund their election campaigns.

14) Rupp struck up a conversation with Tobiason and became acquainted with him. He learned Tobiason was very disgruntled with regard to how he had been treated by the government in business and in his personal life.

Rupp's June, 1998 Meeting with Tobiason

15) Rupp met again with Tobiason at a gun show on June 6, 1998.

16) Tobiason was selling a new manual entitled *Advanced Biological Weapons Design and Manufacture (Why pay to recruit troops and build factories to wage war and kill for you when nature will do it for free. Or, if you can make jello, you can wipe out cities—Enjoy!)".*

17) One manual had chapters on:

    a) Biological entry by respiratory, gastrointestinal, genitourinary and dermal routes.

    b) Bacteria Based weapons

    c) How to grow and identify bacteria

    d) Anthrax

    e) Botulism

f) Tetanus

g) Diphtheria

h) Staphylococcus

i) Streptococcus

j) Pneumonococci

k) E. Coli

l) Salmonella

m) Bubonic Plague, Black Death

n) Cholera

o) Tuberculosis and Leprosy

p) Listeria

18) A sample from a couple of pages of one of the 250 page books is particularly chilling. In the chapter on Bubonic Plague, Tobiason states that the culture can be made "in a salt shaker apparatus that can easily be attached to the underside of vehicles with magnets and carried into the area by trusted workers. [This method is called reverse conscription in which the enemies conscripted workers and soldiers can unknowingly be conscripted by you to fight against their own organizations for you. If governments can force their own people to fight for them and uphold their tyranny, then you certainly can do it as well.]

"It is recommended that Y. pestis be used in cocktail weapons where multiple organisms can act together to increase each others invasiveness and help break down host defense. The use of all 3 strains of Y. Pestis or all 3 species of Yersinia along with other organisms should overcome vaccine defenses. The use of cholera in these combinations is not advised.

[Authors note: In conversations with federal undercover agents, I have frequently been told euphemistically that "they

can kill you whenever they want" which obviously is intended to mean the US government. My response so far has generally been to tell them that I could kill them six months after I am dead with nothing more than a Christmas card with anthrax and poison ivy, or flea eggs, blood Jell-O and plague. The ultimate weapon that citizens can use against a tyrannical government is not only the knowledge of how to recover, grow and deliver these diseases as a weapon, but to be able to arm and equip and entire army with this ability...The net effect is that you now have an army armed with invisible and self reproducing bullets. The only safe people in the government are those living in space suits since any vehicle, piece of mail, package, or object can easily be infected. Those in government who think they can control a population with police or an army can be easily disposed of, as well as their army. The simple idea of anthrax or plague on a tree branch with poison ivy or itching powder, or on dust inside of a sealed drawer in your home can instill fear an death in the enemy. These make easy, lethal, invisible, reproducible, and highly effective booby traps that the enemy cannot easily associate with any particular person or location. And they can be killed by the thousands just by the act of brushing against a tree branch in the wrong area.

If the US government, or any other government, for that matter, thinks they can disarm and regulate every aspect of their citizens lives simply because they can take away their subjects money and use it to hire an armed system of police and army to enforce their rules, they are in for a rude awakening. Most people in a society follow the rules either out of fear of the law, or respect for it and their fellow man. The experiences of my life have proven over and over repeatedly that the laws of the United States (and many other countries) don't even mean anything. Even the US Bill of Rights amount to little more than a bunch of worthless words on a piece of paper. That is why I have written this book. The people of this country and not a lot of bought and paid for politicians who write "Jim Crow" financial and property ownership laws will decide under what rules we are going to

live. Even the ability to raise vast sums of money and hire huge armies isn't going to protect unjust governments anymore. The only thing that can protect them now is fair laws that people can live with. If the laws of this nation are not going to be fair then it is my right, and my duty to fight this government any way I can, even if it costs me my own life. Writing this book is one way of fighting their tyranny. There are many other ways as well. *See* Exhibit 2.

19) Tobiason and Rupp talked again, and Tobiason felt comfortable discussing scientific and other personal matters with Plaintiff.

20) Tobiason made statements which suggested to Rupp that Tobiason had crossed the line from doing library research related to chemical and biological weapons, to actually having created biological weapons, to wit nerve agents, in small quantities.

21) Tobiason told Rupp that he had biological weapons and that he was going to use them against the United States Government and its people and officials.

22) Tobiason also told Rupp that he was under surveillance and that he "could have a surprise" ready for agents.

23) Rupp had read Tobiason's manuals, and he judged that Tobiason had the educational and practical knowledge to carry out his threats.

24) Tobiason told Rupp about his experimentation with toxic biological chemicals. He mentioned using jello to grow a medium-like toxic material, and also discussed using Malathion and/or Parathion, using ultra violet light to switch the ionic charges of the chemicals to turn the substance into a nerve gas.

25) Tobiason discussed the history of Anthrax with Rupp and how to get the Anthrax ingredients from nature to obtain the necessary bacteria. Tobiason told Rupp that he had his own culture medium by using household jello. He also discussed using blood powder (dried

slaughterhouse blood), which is used as proteins to get the bacteria to grow.

26) Rupp said, "Where are you going with this?" Tobiason said, "It ain't going to be pretty, and its coming real soon." Tobiason added that the Oklahoma city bombing would be nothing compared to what he was planning to do with manufactured biological weapons.

27) Rupp believed, and a reasonable person would have believed, that there was imminent danger that Tobiason would carry out his threats and violate federal and state laws. A reasonable person would have believed that Tobiason had already violated federal law by creating nerve agents and biological weapons. *See* 18 U.S.C. § 175 (regarding creation of biological weapons); 18 U.S.C. § 2332a et seq. (regarding use of weapons of mass destruction.)

28) Rupp felt that if Tobiason went through with his threats and Rupp had not done everything he could to stop it, he couldn't live with himself. (By way of comparison, Michael Fortier was fined $200,000 and sentenced to 12 years in prison for failing to alert authorities in advance about the Oklahoma City plot.)

Rupp tells FBI and his Employer about Tobiason

29) Because of that belief, on the following Monday morning after the gun show, Rupp contacted federal law enforcement agencies to report what he knew of Tobiason and was put in touch with Paul Vick, an FBI agent. Rupp and Vick discussed what Rupp could do to get more information about Tobiason. *See* Exhibit 3. Rupp believed Tobiason might be at a gun show in Wichita the week of June 13, 1998.

30) The same day, Rupp informed David Phillips and Cindy McNorton of the situation.

31) Rupp advised them that the FBI might want him to record a conversation with Tobiason.

32) At Phillips direction, McNorton told Rupp, "You can continue to cooperate with the investigation with the FBI, but you will have to quit your job if you do."

33) The attempt by Phillips & Tobiason to prevent Rupp from cooperating with the FBI was a federal crime. *See* 18 U.S.C. § 1512(b) (hindering a communication to the FBI and attempting to cause someone to withhold testimony is a federal crime).

34) Rupp asked, "What can I do?" McNorton replied "You can't make yourself a witness."

Rupp's Letter to Tobiason and his Reply

35) After Plaintiff's conversation with Phillips and McNorton, he was contacted by Agent Vick.

36) Shortly after the weekend of June 15, 1998, Agent Vick determined that Tobiason did not show up at the gun show on June 15, 1998 where he had been expected as a vendor. *See* Exhibit 3.

37) On June 16, 1998, Vick discussed with Rupp Tobiason's failure to show up at the next gun show. They noted that the only telephone number listed for Tobiason had been disconnected and that the only way to communicate with him was by mail to his post office box. Vick said he was concerned about what Tobiason might be capable of on a short-term basis. Vick asked Rupp if he could write a letter to Tobiason expressing a sympathetic attitude and requesting the date of his next return to Wichita. Importantly, Rupp discussed with Vick the need to include the following plea to Tobiason: "Please do not act until we talk." *See* Exhibit 3.

38) Vick instructed Rupp to keep the letter confidential.

39) Rupp told Vick that McNorton said that he shouldn't be involved with the investigation. Agent Vick replied, "Do they realize they are talking about the death of thousands of people?"

40) Rupp explained to Vick that his bosses did not want him to be a witness. Vick assured Rupp he would not be a witness. In the end, Rupp told Agent Vick he felt compelled to do whatever he asked.

41) Rupp wrote a single letter to Tobiason in mid June, 1998.

42) In it, Rupp requested a catalog of his more recent books, the time when Tobiason might return and a plea not to act on his terrorist threats. Rupp also explained in the letter that he felt he had some positive alternatives to Tobiason's problems with the government.

43) Tobiason thereafter sent a reply to Plaintiff's letter.

44) In the reply received on approximately June 29, 1998, Tobiason included a catalogue of his publications. He wrote an additional personal note, which stated, "I have already decided an effective and quite appropriate solution to both the justice system and govt's (sic) actions. Thanks anyway. Will you be at the Wichita Show 11-13 Sept.?" *See* Exhibit 3.

45) Rupp immediately turned this letter over to the FBI.

46) Vick asked Rupp about the letter. Vick asked Rupp if he was going to the gun show. When Rupp indicated that he was, Vick asked Rupp to talk to Tobiason and assess his intentions. *See* Exhibit 3.

The September, 1998 Gun Show

47) On September 9 or 10, Rupp was talking with Sharon Aldridge, a paralegal in the office, who asked what Rupp had planned for his birthday that weekend.

48) Rupp told her he was going to dinner and planning to attend the gun show on Saturday with a friend. Rupp added that he also had to do a favor for the FBI.

49) Rupp immediately called McNorton and left a message for her.

50) When Rupp finally reached McNorton, he told her that the FBI wanted him to assess the state of mind of Tobiason at the gun show. He also told her about the exchange of letters. He said he thought that the possible encounter would be the last thing he would do regarding the matter.

51) McNorton said that she would get back with him.

52) McNorton did not get back with Rupp before the gun show and never instructed him not to attend or stay away from Tobiason.

53) Rupp attended the gun show on Saturday, where he had a conversation with Tobiason.

54) Tobiason was selling a new book with high quality computer generated color photographs showing some of the bacteria he cultivated. *See* Exhibit 3, 4.

55) Rupp told Tobiason he was surprised to see him. Tobiason responded, "I'm not dead yet or in jail."

56) Tobiason told Rupp that federal agents were "still messing with me", bothering him, following him, and wanting to talk to him. He said the government was sending people in to get close to him, but he knew they were agents. *See* Exhibit 3.

57) Tobiason discussed putting the plague virus on scotch tape, then putting it in letters, and mailing the letters to all National Rifle Association members nationally. The reason he said he wanted to do this was so that the NRA members could culture the virus. Tobiason said he wanted their assistance in prosecuting a war against the United States government, because he said, "the government needs to be stopped." He said he wants "this stuff" (the plague virus) out there" and also wanted to get his books out there as well. Rupp asked if he had already mailed the plague virus. Tobiason responded "I could do it."

58) Tobiason said that he was upset over the fact that the government did not approve a submitted patent request for him regarding a phosphate reduction process. He said he was upset about the patent laws "screwing" him, and stated that big businesses, working with the government, were the only ones who can patent new processes.

59) Tobiason said that he planned to attend the Sioux City, Iowa gun show in two weeks and that he had "a surprise for the people screwing with him." *See* Exhibit 3.

60) He gave Rupp a notarized affidavit dated April 1, 1998 in which he justified his position.

61) He told Rupp that if the government helped him change the patent laws, to make it more fair for people like himself, then he would make his books go away. Tobiason said he had tried to get his story out to news media companies, including the national press. However, they all turned him down, including the *National Enquirer.*

62) He stated, "I'm not afraid to die. I'm ready to fight. What do I have to do, kill a million people to get them to print my story?" These statements were made in front of others besides Rupp, including Jenny McCaslin, a friend of Rupp's.

63) Rupp had another conversation with Tobiason at the gun show on Sunday, September 14, 1998. Rupp said, "I hope to see you next year (at the next gun show). Tobiason replied, "You won't see me next year, You'll read about it (in the news). They've gone too far." Rupp tried to talk him out of carrying out any of his threats. However, Tobiason advised Rupp that his mind was made up. He said, "It's too late for that."

64) Tobiason compared himself to Timothy McVeigh and Terry Nichols and said, "I'm not going to be around afterwards to deal with any consequences." He said,

"The government has gone too far, and someone needs to stop them, and I'm going to stop them."

65) Tobiason refused to provide any specific details of intended actions. He did state that his delivery methods and techniques were almost infinitely variable. He stated that he could send the plaque virus around in the mail, or "I don't even have to use the mail." "I can put ehtylene oxide (a gas) through the pipes into any building, even the White House.

66) Tobiason admitted making viruses, which is a violation of the law.

67) Tobiason said that government agents had spoken with him and asked him what he wanted in order to stop putting out that type of material, and he said he wanted a change in the patent laws to make it fair for people like him to obtain patents.

68) In conclusion, Tobiason told Rupp that Rupp would not be seeing Tobiason again. He said the book business was not working out financially. He said he was going to "fight them, someone has to, and I'm going to do it."

69) Based on those conversations, Rupp was very concerned for the safety of the American public and federal law enforcement agents.

70) The morning of September 14, 1998, Rupp reported his conversation with Tobias to Agent Vick.

Rupp's Termination from Employment

71) The afternoon of Monday, September 14, 1998, Phillips, McNorton and Charles Dedmond called Rupp into a room at work and told him to resign or be fired.

72) They told him he was being fired because Rupp had lied to them and that he knew Tobiason was going to be their client, creating a conflict of interest, and they had no choice but to terminate him.

73) Rupp told Phillips he didn't think he did anything wrong, because the FBI said that he wouldn't be a witness. Phillips replied, "They always say that."

74) Rupp told Phillips that he felt it was his duty as a citizen to do what he had and that any citizen would have done the same.

75) Rupp told Phillips that he was trying to prevent a disaster.

76) Phillips said the FBI had people who could do that.

77) Rupp explained that he felt like he was the closest person to Tobiason and seemed to be one of the few he would talk to.

78) Rupp said that he felt he had an absolute right and duty to do as he did.

79) Phillips told Rupp to pack up his office and leave.

Public Defender Office Appeal Remedies

80) The Federal Public Defender is employed by the Judicial Branch, as part of the United States District Court for the District of Kansas, which is part of the United States Court of Appeals for the Tenth Circuit.

81) The Criminal Justice Act provides that each Defender may appoint attorneys and other personnel without regard to the provisions of Title 5 governing appointments in the competitive service. (18 U.S.C. § 3006A(g)(2)(A)).

82) The Defender personnel manual provides that employees are terminable at will of the Defender and therefore are not entitled to any defined procedural rights prior to termination absent the establishment by the defender of such rights.

83) The Defender personnel manual provides that as follows: The defender will provide written notice of adverse action, including termination of employment. An

employee wishing to contest the adverse action shall file written objections or response with the Defender within five days and may request a hearing. In the event a hearing is held, it is conducted by the Defender in an informal manner. After the hearing, the Defender will inform the employee in writing of the decision. The decision of the Defender is final, and no further review is provided.

84) The manual also mentions the "Consolidated Equal Employment Opportunity and Employee Dispute Resolution Plan of the United States Court of Appeals for the Tenth Circuit." This plan does not apply to claims of termination in violation of First Amendment rights. *See Exhibit* 5.

85) Consequently, Rupp was accorded no procedure for review of his termination by the Courts or any impartial third party. Instead, the only review provided for his termination was by the person who made the decision to terminate him. Nevertheless, Rupp exhausted available administrative remedies by pursuing the minimal grievance procedure provided in the handbook.

Rupp's Attempts to Regain Employment

86) On September 18, 1998, Phillips wrote Rupp a letter attached and incorporated by reference as Exhibit 6, stating why he was asked to resign.

87) On September 20, 1998, Rupp wrote Phillips a letter attached hereto as Exhibit 7, stating his position.

88) On September 24, 1998, Rupp wrote Phillips another letter attached as Exhibit 8, stating his position and objection to his termination of employment.

89) Subsequently, Phillips had a meeting with Rupp and his attorney at which Rupp and his attorney again presented their side of the case. They emphasized that Rupp had an absolute right as a citizen to do what he did.

90) By letter dated October 2, 1998 and attached hereto as Exhibit 9, Phillips affirmed the discharge of Rupp and made his employment termination final.

91) Because he had no other right to appeal or avenue to protest his termination, in early October, 1998, Rupp contacted his United States Senators to request their assistance.

92) On October 29, 1998, the office of Senator Roberts advised him in writing soon thereafter that they could not assist.

93) No direct action is available for Rupp to seek redress for violation of his constitutional rights, other than this action brought directly under the First Amendment to the United States Constitution.

Phillips violated Rupp's First Amendment Rights

94) Rupp had a First Amendment right to write and mail a letter to Tobiason, to talk with Tobiason at the gun shows and to disclose what he was told to the FBI.

95) Rupp's speech addressed a matter of public concern in that it was of great interest to the community and was made by him as a concerned citizen and not merely to him as a government employee. *See Exhibit* 10. Rupp was only doing what any conscientous citizen would have in light of the heinous crimes he believed were imminent and in light of the FBI's specific request for assistance.

96) Rupp cooperated with the request for assistance made by one agency of the federal government; as a result, a different agency of the same federal government took action against him. *See* Letter dated November 10, 1998 from FBI (Exhibit 3), referring to Mr. Rupp as a "conscientious citizen and stating:

"...the information Mr. Rupp brought to our attention was of a serious nature as it involved

threats of potential harm and death to many innocent individuals and law enforcement officers. **Without the assistance of the public, to include Mr. Rupp, the effectiveness of our law enforcement efforts would be seriously impaired.**

Exhibit 3. (emphasis added).

97) Rupp's speech was of great public interest and outweighed the interest, if any, of the federal public defender in preventing his speech.

98) Rupp's speech did not disrupt the public defender office or cause it to maintain a less efficient or effective workplace.

99) The speech did not reflect negatively on Rupp's ability and competence to do his job. *See* Letter dated November 10, 1998 from FBI (Exhibit 3), ("At no time did Mr. Rupp's assistance involve or reveal any information regarding the Public Defender's Office.")

100) In fact, Rupp's employer would never have learned of Rupp's discussions with Tobias and the FBI had Rupp not volunteered the information.

101) Rupp's speech was a substantial or motivating factor for his termination of employment.

102) Rupp would not have been terminated in the absence of the protected speech.

103) Phillips made the decision to terminate Rupp.

104) In making that decision, Phillips was acting in a private capacity, but engaged in governmental action under color of federal law.

105) Only the judiciary can vindicate Rupp's rights.

106) There are no "special factors counseling hesitation" in the recognition of a damages remedy against Phillips.

Phillips is not entitled to Qualified Immunity

107) Phillip's action violated clearly established constitutional rights of which a reasonable person (and in this case a reasonable lawyer) should have known.

108) Rupp's First Amendment rights were clearly established in that the contours of the right were sufficiently clear that a reasonable official would understand that what he was doing violated that right.

109) The law is clearly established that public employees may not be discharged in retaliation for speaking on matters of public concern, and in this case Phillips should have known that the government employer's interest in the efficiency of its operations did not outweigh any interest he had in preventing Rupp's speech.

110) Consequently, Phillips is not entitled to qualified immunity.

Rupp's Damages

111) As a direct and proximate result of defendant's unlawful acts, Plaintiff has suffered:

a) Economic loss in the form of lost wages and lost benefits;

b) Vocational-Professional losses in the form of a detrimental job record, loss of employment, career damage, a diminished career potential, future pecuniary losses; and

c) Emotional pain, suffering, inconvenience, loss of enjoyment of life and mental distress in the form of embarrassment, humiliation and anxiety.

112) The defendant's conduct was intentional, willful, malicious and outrageous because it had an evil purpose and showed conscious disregard for and reckless indifference to the rights of the plaintiff and others.

Prayer for Relief

WHEREFORE, cause having been shown, Plaintiff prays judgment:

a) Awarding judgment against defendant and in favor of plaintiff;

b) Issuing a permanent injunction prohibiting defendant from discriminating or retaliating against Plaintiff or others similarly situated; and

c) Awarding to plaintiff damages, including, but not limited to, backpay, interest on backpay, future pecuniary losses, damages for emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life, and

d) Awarding costs and attorney fees; and

e) Granting such additional relief as the court deems just and proper.

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Plaintiff designates Kansas City, Kansas as the place of trial.

Lee J. Hollis 17241
5100 W. 95th Street
Prairie Village, KS 66207
913-385-5400
913-385-5402 (fax)
ATTORNEY FOR PLAINTIFF

Exhibit 3 Page

[SEAL OMITTED]
U.S. Department of Justice

Federal Bureau of Investigation

In Reply,
Please Refer to
File No.

1300 Summit
Kansas City, Missouri 64105-1362
November 10, 1998

Mr. Richard Ney, Esq.
225 North Market Street
Suite 100
Wichita, Kansas 67202

Re: Information Provided by
Mr. Kenneth Daniel Rupp

Dear Mr. Ney:

In response to your request and completion of a Privacy Waiver and Certification of Identity, please find enclosed appropriately redacted documents regarding assistance provided by Mr. Rupp to the FBI in support of our investigative mission.

Mr. Rupp's confidential relationship with the FBI was limited to maintaining casual contact with an individual and providing information of an intelligence nature to assist with the investigation of a possible criminal violation. Appropriate measures were taken to ensure Mr. Rupp would not be called upon as a witness, and his former employer's request to avoid engaging in any consensual recordings were honored. At no

time did Mr. Rupp's assistance involve or reveal any information regarding the Public Defender's Offi

The enclosed documents demonstrate tnat the information Mr. Rupp brought to our attention was of a serious nature as it involved th0reats of potential harm and death to many innocent individuals and law enforcement officers. Without the assistance of the public to include Mr. Rupp, the effectiveness of our law enforcement efforts would be seriously impaired.

Based upon Mr. Rupp's employment with the Federal Public Defender, this office took special care to ensure that his actions as a conscientious citizen would not reveal or violate any confidences entrusted to him and that the only information to be provided would involve violations of the criminal laws. To this end, Mr. Rupp was not expected to testify and was counseled to avoid any potential conflict of interests. Furthermore, his assistance was supervised to ensure the above.

Sincerely,

/s/ Larry J. McCormick

Larry J. McCormick
Special Agent in Charge

Enclosures

H-1

Office of the
FEDERAL PUBLIC DEFENDER
DISTRICT OF KANSAS
201 U.S. Courthouse
500 State Avenue
Kansas City, Kansas 66101-2400
(913) 551-6712
FAX (913) 551-6562

DAVID J. PHILLIPS
Federal Public Defender

CHARLES D. DEDMON
First Assistant Federal Public Defender

October 2, 1998

Mr. Richard Ney, Attorney at Law
225 N. Market, Suite 100
Wichita, KS 67202

Re: K. Daniel Rupp

Dear Mr. Ney:

This letter constitutes my written decision regarding Mr. Rupp's adverse action hearing. In summary, and as will be detailed below, I must regretfully inform you that my decision is to confirm the adverse action previously taken, which will make Mr. Rupp's termination of employment final.

Two general reasons were provided in my September 18, 1998 letter to Dan. First, there was the conflict of interest question and second, there was the breach of trust and failure to follow agreed instructions with reference to my perception of the conflict issue. The two issues are multi-faceted and intertwined, and, as a factual matter, essentially uncontested.

In June of 1998, this matter first came to my attention. There had been discussion between Mr. Rupp and F.B.I. agents about a person Dan had met at a gun show. Dan expressed his

concerns to the F.B.I., advising them that the man's disgruntled nature and expertise in deadly gases were alarming. The F.B.I. took note and wanted to enlist Mr. Rupp's further support, asking him to maintain contact, report those contacts, and to be fitted with a "wire", so that the contacts would be recorded. After some hesitation, he reported these developments to Ms. McNorton and to me.

He was instructed by Ms. McNorton to discontinue further actions with the F.B.I. He was told that I deemed his course of action in alerting the F.B.I. commendable, but that given the adversarial role of a public defender office, further action on his part in this regarding would be forbidden.

Page Two
October 2, 1998
Mr. Richard Ney

Mr. Dedmon also spoke with Dan. He, like Ms. McNorton and myself, discussed the difficulty we often have gaining the trust of clients, who believe that we, as a federal agency, are not really independent of the prosecution. Mr. Dedmon told Mr. Rupp that if it came about that people on our staff were known to be working in a continuing informant capacity, that would damage our institutional integrity. Mr. Rupp expressly agreed to refrain from further involvement, and was aware that such involvement could result in his termination.

Mr. Rupp now suggests that he believed only he could assist the F.B.I. in obtaining further information from and about the individual, and that he had no obligation to obey an order which would possibly cause thousands to die ghastly deaths. A book, with grisly photographs, was presented at the hearing to support Mr. Rupp's grave concerns.

I find, however, that Mr. Rupp was not the only person who could assist the F.B.I. That agency conducts such

investigations constantly. Dan admitted he was not essential to the investigation in June of 1998. However, when asked to continue a series of surreptitious communications with the target of the investigation, at the behest of, and under the direction of, the F.B.I. Mr. Rupp readily agreed. Mr. Rupp, despite unmistakably clear instructions from Ms. McNorton to call for instructions even if incidental follow-up contact occurred, instead withheld his subsequent written communication to the target and the five or six F.B.I. meetings concerning future contacts with the target from everyone in the agency. Instead of desisting from this situation, he delved more deeply into it, even to the point of asking the F.B.I. about possible enlistment in the Witness Protection Program, which, as he must be aware, applies to an informant whose identity has become known.

Significantly, Mr. Rupp totally agreed to Ms. McNorton's, Mr. Dedmon's and my own parallel orders regarding the propriety of future intentional contacts, and the need to promptly report future unintentional contacts, or unforseen developments. Mr. Rupp agreed without reservation. He did not express doubt over the legality of his orders, or take action to address unexpressed disagreement through the available grievance procedure. Instead, he was explicit in his agreement. He was advised that a decision by him to continue in disregard of our agreed action would lead to immediate termination.

Mr. Rupp now argues that he had, and has, an absolute right to do as he did. Yet no such argument was made in June of 1998, when it could have been addressed without imperiling his job. Mr. Rupp told us that "I felt compelled to do whatever they asked". "They" refers to F.B.I. Agent Vick. This position was kept secret from our office. Only an inadvertent statement by Mr. Rupp led to discovery of the situation.

It is not lightly that I come to the conclusion to make Mr. Rupp's termination final. Yet the situation created by his covert F.B.I. activity is intolerable. We had an employee with

access to all of our confidential documents having secret meetings with the F.B.I. against not only my explicit order, but also his own promise, made in seeming sincerity, but not in good faith. It is among the most serious category of employee misconduct with which I have been presented, and placed at risk is the institutional integrity of the entire office. When combined with the willful and deceptive nature of the events, it is not possible to reverse the earlier decision. Accoringly, the discharge of K. Daniel Rupp is affirmed and final.

Sincerely yours,

s/s David J. Phillips
DAVID J. PHILLIPS
FEDERAL PUBLIC DEFENDER
For the District of Kansas

DJP/dmr

DAN RUPP
999 N. Silversprings Blvd., #416
Wichita, Kansas 67212

September 24, 1998

David J. Phillips
Federal Public Defender
for the District of Kansas
201 U.S. Courthouse
500 State Avenue
Kansas City, Kansas 66101- 2400

Dear David:

This letter is intended to serve as a written response and objection to the adverse job action taken against me, specifically termination of my employment. I am also formally requesting a hearing as set forth in section 5.A.2 in the Federal Public Defendant Personnel Policies and Procedures Manual.

STATEMENT OF FACTS:

The facts and sequence of events began in late May or early June 1998. I had attended a gun show where I bought book which detailed the manufacture and use of chemical weapons of mass destruction. The man at the booth was the author of this material. He seemed to be very disgruntled with regard to how he had been treated by the government in business and his personal life. He voiced threats to use this type of weapon against the United States Government and its people and officials. The man had the educational and practical knowledge to put the information in his book to use. He made statements such as the Oklahoma City bombing would be nothing compared to what he was planning to do with manufactured biological weapons. The man's statements, coupled with my understanding that he had the skills to carry out his threats, alarmed me. I believed there

was imminent danger that this individual would carry out his threats.

On the following Monday morning, I spoke to Dennis Laughrey of the ATF. I truly believed that the man was planning a terroristic attack which could harm innocent people. I showed Dennis Laughrey the material which the man had authored. Dennis Laughrey referred me to Agent Paul Vick of the FBI Office. I told Paul Vick about my conversation with the author of this book. I later delivered copies of other books I had acquired from this man the previous year. Paul Vick asked me for my opinion regarding what this man may be capable of and what I could do to get more information. We discussed several possible scenarios, most of them suggestions of what I was willing to do.

Later that day, I spoke with you to inform you of the situation. I think we spoke a couple of times. Cindy McNorton and I also spoke about this situation on or about that day. I disclosed that the FBI may want me to record a conversation with this man. However, I believe such a recording was my suggestion. Cindy McNorton told me that I could not be a witness in any way in this matter and that my job would be at risk if I made myself a witness. I acknowledged that and said I would not sneak around her. The extent of my subsequent involvement was to write one letter and speak to the individual at the September 12-13 gun show. My only role was to attempt to assess the man's state of mind and to try to determine if his intentions were serious. A recording was never made of any conversations I had with the man.

After I disclosed the situation to you and Cindy McNorton, I was contacted by Agent Paul Vick. Agent Vick asked me to correspond with the author of the books I had given them. He wanted to know any information on the schedule of his travels. Once again, I believed the man was serious about his intentions to commit a terroristic attack and presented an imminent risk of harm to innocent people. Additionally, this man seemed to be talking only to me on the

basis of meeting me a year prior to this situation. Consequently, I told Agent Vick that I felt compelled to do whatever they asked.

I wrote a single letter to the man. I requested a catalog of his more recent books, when he might return, and a plea that he not act on his terroristic threats. I explained that I thought I may have some positive alternative to his problems with the government. I was instructed by Agent Vick to keep the contact with the man confidential. I told him my bosses were concerned that I might be a witness. Agent Vick assured me that I would not be. Agent Vick was concerned about what the man could be capable of on a short time basis. At some point, I received a reply to my letter from the man saying in effect thanks but no thanks for my alternative and plea not to act. He said that he planned to possibly attend a gun show in Wichita on the weekend of September 12-13. I turned this letter over to Agent Earl. I later had a short meeting with Agent Vick and he asked what I thought of the man's state of mind and what he meant by the contents of the letter. I gave him my assessment. As the day of the September gun show approached, I had a meeting with Agent Vick. Agent Vick requested that if I indeed attended the gun show and made contact with the man to assess the man=s state of mind.

On September 9 or 10, I was talking to Sharon in our office who asked what I had planned for my birthday that weekend. I told her I was going to dinner with friends and planning to go to the gun show on Saturday with a friend. I also told her I had a favor to do for the FBI. She said I should call Cindy McNorton before I did anything and I said that I probably should as I had told her I would. I did contact Ms. McNorton after one or two attempts and told her the FBI wanted me to assess the state of mind of the man if he should attend the gun show. I also told her about the exchange of letters. I told her I expected this possible encounter to be the last thing I would do regarding this matter. She said that she

would get back to me and did not. Ms. McNorton never instructed me refrain from acting as I had outlined to her.

I went to the gun show on Saturday and Sunday. I had several conversations with the man and others. On Monday morning I met with Agent Vick and told him what the man said. At the conclusion of our meeting, Agent Vick thanked me for the help and we agreed that this was about all I could do and was no different than any citizen had a right and duty to do.

On Monday afternoon I met with you, Charles, and Cindy. You informed me that I knew that we would be representing this man when he was charged, creating a conflict of interest. You said that I had lied to you and could no longer be trusted and that you had no choice but to terminate me. I then was told to resign or be fired. I tried to tell you that I had felt it was my duty as a citizen to do what I had and that any citizen could do the same. I also told you that the FBI has assured me that I would not be a witness and you responded that they always say that. I also said that it was my understanding that I was not a confidential informant. I said words to the effect that I was trying to prevent a disaster and you responded by saying the FBI had people who could do that. I tried to explain that I felt like I was the closest person to him and seemed to be one of the few he would talk to. I felt I had an absolute right and duty to do as I did. The meeting was terminated and I was told to pack up my office and leave.

RESPONSE TO ALLEGATIONS:

In your letter dated Friday, September 18, 1998, you listed various justifications for my dismissal. Response to each allegation is as follows:

1. "Your action constitutes a breach of trust, and has created an atmosphere wherein you can no longer be trusted to do what you are told or to keep sensitive information confidential."

My actions did not constitute a breach of trust. I disclosed my role in the situation immediately following my initial contact with the FBI. I also contacted Cindy McNorton prior to attending the September gun show. We discussed the situation. However, she failed to get back in contact with me after we had spoken regarding advise on how to act. In addition, during the course of my employment with the Federal Public Defenders, I have proven myself time and again to be trustworthy and very competent in my work. There has never been any allegations that I have failed to keep confidential information to myself. The incident described above represents what I believed to be my duty as a citizen. In addition, I truly believed that this individual represented an imminent threat to the public. His terroristic threats appeared to be serious and he had the capabilities to follow through with them.

2. Violation of Canon 1 by: "Not personally observing high standards of conduct so that the integrity and independence of the office are preserved and so that the defender office reflects a devotion to serving the pubic defender's clients and the principle of equal justice under law."

I believe I observed a high standard of conduct when I reported the individual to the FBI. Had I done nothing and the individual carried through on his threats, I and the Federal Public Defenders Office would have been embarrassed publicly. In addition, we would all have to live with the knowledge that we could have prevented unnecessary injuries or deaths. Failure to report such threats made by someone who was not a client does not violate any canon of conduct. An allegation that I violated this canon, when

analogized with another scenario, shows that this basis for my dismissal is without merit.

If your interpretation of Canon 1 is correct, then any employee of the office would be in violation if they reported a burglary of their home. Indeed, if an employee witnessed a crime or was a victim, they would be precluded from reporting it. The argument being that the suspect may, at some future time, become a client.

Finally, I believe my employment record speaks for itself with regard to Canon 1. I have always received positive reviews and reports regarding my professionalism and work ethic. I have always served our clients diligently and with the highest degree of respect. The allegation that I was terminated for violating Canon 1 is, therefore, merit less.

3. Violation of Canon 2 by: "Engaging in activities that would put into question the propriety of your conduct in carrying out the duties of the office."

My contact with the FBI did not concern any cases or clients which were represented by the Federal Public Defenders. I never discussed or was questioned about any pending or closed cases that the FBI may have against a client. Had that occurred, I would have terminated the meeting immediately. The sole subject of our communications concerned the individual mentioned above and the terroristic threats he made against the public and government.

Furthermore, even my job duties sometimes requires me to make contact with the FBI. It is not uncommon that contact regarding witnesses or client cases is necessary. The allegation that contact with the FBI constitutes a violation of Canon 2 is absurd. There has never been any allegations that

my job suffered during the period in question. My employment record reflects that I have always performed appropriately while carrying out the duties of this office. I also disagree with the characterization that I was acting undercover for the FBI. The single letter written to the man limited its inquiry to requesting published information, discerning his itinerary, and pleading with him not to make good on his threats. My only other contact with this man was at the September gun show. My conversations with him merely attempted to determine if he was serious about his threats.

4. Violation of Canon A and B by: "Not respecting and complying with the canons, by not reporting to your supervising authority any attempt to induce you to violate the canons, and by not being faithful to professional standards and maintaining competence in your profession."

I did not violate Canon A and B. First, I have always complied with the Canons of conduct. I was never induced or recruited to violate the Canons. Finally, I have always been faithful to the professional standards of my profession. The conduct in question did not concern any client of the office. I believed the threat was real and imminent. I only acted as a concerned citizen would by reporting it. Once again, I do not believe the Canons were intended to force the employees of the Federal Public Defenders office to assist in criminal conduct. Failure to report knowledge of a terroristic attack puts innocent lives at stake. Had an employee of the office had knowledge that the Oklahoma City bombing was imminent, I do not believe the Canons would mandate that he stand silent and watch people die. Once again, my employment record speaks louder than words. I have never been accused of or reprimanded for any violation of the Canons or for failure to perform my

duties competently. There are also no allegations that my involvement in the current situation adversely affected any cases that I was assigned to.

5. Violation of Canon 3F by: "Not avoiding conflicts of interest, and by not advising me of your renewed involvement in the FBI investigation when you knew that such could constitute a conflict of interest in the performance of your duties. You should have observed the restrictions on your activities imposed by me in this regard."

There certainly can be no claim that my actions posed a deliberate conflict with the office representing the individual involved for some future crime. The office was conflicted from the moment the man told me about his desire to a commit terrorist act and I clearly never solicited or expected such statements from him on that first encounter. If he had indeed committed an act such as he described to me, I would have been a witness with information about his predisposition and plan to commit mass murder. Our office could hardly have pretended I was not a witness to such a statement and defended him. Any conflict, therefore, came about inadvertently and prior to any meeting I had with the FBI. Indeed, you had no problem with my initial reporting of this matter to the authorities and in fact commended me for it.

A charge that potential conflicts with future clients exist is also merit less. Again, the man was not a client of the office. The man is not a client of the office today. Mere contact with the FBI does not constitute a potential conflict of interest because it is sometimes required as part of the performance of my duties. I never discussed or was questioned about any client of the Federal Public Defenders office. Once again, if I had been, I would have terminated contact immediately. My renewed involvement consisted of writing a single letter. I was

not acting as an undercover agent of the FBI. The letter merely requested additional publications, the man's itinerary, and a plea not to act. I did this because I truly believed this man was serious about his terroristic threats and that harm was imminent. I contacted Cindy McNorton prior to my contact with the individual at the September gun show. However, Ms. McNorton failed to get back with me as she assured me that she would. I had put her on notice, but she did not indicate to me at that time that she disagreed with my conduct. I did not attend the gun show with the sole purpose of making contact with the man. The request was that if I happened to go and did encounter the man to please assess whether he was still serious about the threats. I would have made that inquiry even if Agent Vick had not mentioned it. Once again, my conduct did not constitute a conflict of interest with any client of this office or adversely affect my ability to perform my duties.

6. Contact with FBI in relation to the current matter during office hours.

The policy of this office has historically accommodated employees with limited personal contact during office hours. I have earned comp time through my employment which can be assessed against any perceived abuse of office hours. However, the practice of the office includes individuals making personal calls, socializing on various subjects (specifically sports), running personal errands during business hours, and babysitting their children while they are at work. Any use of business hours on this matter was limited and I believed was in the publics interest. Finally, there has never been any allegation that the above situation adversely affected my work performance.

As I am sure you know, I have enjoyed my employment with the Federal Public Defenders office. I have always performed my job with professionalism and within the Canons of Conduct discussed above. I have performed my duties competently and believe I have excelled in providing diligent investigative support for the clients. My performance record supports this. I sincerely hope that upon review of my response, you will determine that termination was premature in this case. I would certainly like to rejoin the Federal Public Defenders office as an employee. I believe I am an asset to the office and that our clients will benefit from my return. After you have reflected on my position in the matter I am sure you will agree with me that I had a moral obligation to report what I believed to be an imminent threat. I am also certain that the Canons were not meant to protect non-clients who are planning to harm innocent people.

Please contact my attorney regarding a setting for hearing on this matter. You may contact my attorney Richard Ney at 225 North Market, Suite 100, Wichita, Kansas 67202; phone number (316) 264-0100. Thank you.

Very truly yours,

s/s Dan Rupp
Dan Rupp

9-20-98

Dear Mr. Phillips;

In late May or June of 1998, I attended a gun show. At that gun show I bought a book from a man who was an exhibitor there. I learned he was the author of this book which detailed the manufacture and use of chemical weapons of mass destruction. In a conversation with this man he made threats to use this type of weapon against the United States Government and its people and officials.

This happened over a weekend and on a Monday morning after the conversation I stopped at the ATF office and talked with Dennis Laughrey and showed him this material. He referred me to Agent Paul Vick of the FBI Office. I told Paul Vick about my conversation with the author of this book. I later delivered copies of other books I had acquired from this man the previous year. Paul Vick asked me questions about what this man may be capable of and what I could do to get more information. We discussed several possible scenarios, most of them suggestions of what I was willing to do.

That same day I spoke with you to inform you of this situation. I think we spoke a couple of times and Cindy McNorton and I also talked on or about that day. I told you the FBI may want me to record a conversation with this man although that, I believe, was my suggestion. I don't think the FBI ever asked me to do anything but correspond with the man once and attend a gun show later to assess his state of mind and intentions. Cindy McNorton told me I could not be a witness in any way in this matter and that my job would be at risk if I made myself a witness. I acknowledged that and said I wouldn't sneak around her.

Later, I was contacted by Agent Paul Vick and asked to correspond with the author of the books I had given them. He wanted to know any information on the schedule of his travels. Due to the seriousness of the risk and the fact that this man seemed to be talking only to me on the basis of

knowing me fora year or so, I told Agent Vick that I felt compelled to do whatever they ask.

I wrote the man a letter asking for a catalog of his more recent books, when he might return, and a plea that he not act on his threats to use weapons of mass destruction as I thought I may have some positive alternatives to his problems with the government.

Agent Vick informed me I was not to commit any illegal act and to keep the contact with the man confidential. I told him my bosses were concerned that I might be a witness and he said that I would not be. He asked me what this man could be capable of on a short-time basis.

I then received a reply to my letter from the man saying in effect thanks but no thanks for my alternatives and plea to not act. He said that he planned to attend, possibly, a gun show in Wichita on the weekend of September 12-13. I turned this letter over to Agent Earl. I later had a short meeting with Agent Vick and h asked what I thought of the man's state of mind and what he meant by the contents of the letter. I gave him my assessment.

As the day of the September gun show approached, I had a meeting with Agent Vick who asked me to assess the man's state of mind if I went to the show and if he happened to be there.

On September 9 or 10 I was talking to Sharon in our office who asked what I had planned for my birthday that weekend. I told her I was going to dinner with friends and planning to go the gun show on Saturday with a friend. I also told her I had a favor to do for the FBI. She said that I should call Cindy before I did anything and I said that I probably should as I told her I would. I did contact Cindy after one or two attempts and told her the FBI wanted me to assess the state of mind of the man if he should attend the gun show and also that told her about the exchange of letters. I also told her I expected this possible encounter to be last thing I would do

regarding this matter. She said that she would get back to me and did not.

I went to the gun show Saturday and Sunday and had several conversations with the man and others. On Monday morning I met with Agent Vick and told him what the man had said. At the conclusion of our meeting, Agent Vick thanked me for the help and we agreed that this was about all I could do and was no different than any citizen had a right and duty to do.

On Monday Afternoon I met with you and Charles and Cindy and you informed me that I knew that we would be representing this man when he was charged, creating a conflict of interest. You said that I had lied to you and could no longer be trusted and that you had no choice but to terminate me. I then was told to resign or be fired. I tried to tell you that I had felt it was my duty as citizen to do what I had and that any citizen could do the same. I also told you that the FBI assured me that I would not be a witness and you responded that they always say that. I also said that it was my understanding that I was not a CI. I said words to the effect that I was trying to prevent a disaster and you responded by saying the FBI had people who could do that. I tried to explain that I felt like I was the closest person to him and seemed to be one of the few he would talk to. I felt I had an absolute right and duty to do as I did. The meeting was terminated and I was told to pack up my office and leave.

Dan Rupp

K-1

6-16-98

Mr. Tobiason;

Could you please send me a catalog and price list of your more recent books? I have an older one on biological weapons and am thinking of buying an updated set. We talked at the Wichita gun show and I believe you have my card. Also, after talking of our common experiences with the legal system, I think I may be able to offer you some positive colutions.

Thanks,

Dan Rupp
P.O.Box 3038
Wichita, KS 67201

Please advise when you may be at this town again and please do not act until we talk.

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Why pay to recruit troops and build factories wage war and kill for you when nature will do it for free
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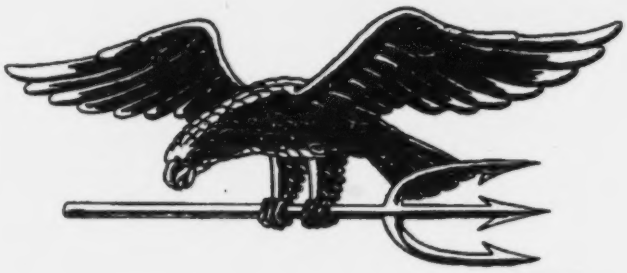

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Advanced Chemical Weapon Design and Manufacture

Chapter 4

Military Phosphorus and Nerve Agent Weapons

"If there is one good reason to teach every living soul on the entire planet how to make nerve gas, it would be the mere existence of lawyers!"

Those military weapons built around the element phosphorus represent an entirely different class of ordnance that deserves its own place in the history of warfare. From the use of phosphorus to generate smoke, start incendiary fires, and severely burn personnel in modern napalm, to the unique application of simple chemicals that easily pass into the body and interfere with life functions in tiny amounts, phosphorus has changed the future of warfare almost to the same extent that nuclear weapons has.

Chemical History of Phosphorus for War

Phosphorus was first discovered and separated from other elements in a pure fashion in 1669 by a German chemist from Hamburg named Hennig. He distilled it as a vapor from urine and found that it glowed in the dark and burst into flame once he exposed it to the air. It was named phosphorus for "the mineral that produces light". Soon afterwards, many derivatives of phosphorus were also discovered such as phosphorus pentoxide, which, when it was dissolved in water would yield phosphoric acid.

In 1770, it became known that phosphorus was an essential component of animal bones and teeth and soon after its value as a fertilizer was recognized, resulting in the large

scale use of animal bone meal to enhance crop yields. The next commercial use for phosphorus came in 1812 with the invention of striking matches which contained a mixture of sulfur, ground glass, glue, an oxidizer, and red phosphorus for the tip. Toy pistol caps would also soon be invented using potassium chlorate in one compartment and red phosphorus in another compartment. When brought together by striking, they would produce a small explosion. Finally, in 1942, chemists named Lawes and Murray would patent the mixing of sulfuric acid and ground bones to yield phosphoric acid directly. This would give rise to all the worlds fertilizer industries drastically increasing food production and allowing the support of the large urban populations in the world today.

In 1885, the invention of the electric furnace allowed for white phosphorus to be produced directly from ores by heating mined phosphate rock with coke and silica. This made it possible to generate large amounts of elemental phosphorus for the first time and would soon open up the discovery and invention of thousands of phosphorus based compounds.

corporations and wealthy individuals are able to protect and perpetuate their empires while legally excluding everyone else from fairly competeing with them.

This type of legislating is done at all levels and throughout all industries. Recently, I was travelling through Colorado and had a flat tire. The bolt holding on my spare had rusted in place and could not be removed. I hitched a ride to the nearest gas station. The owner of this station was an elderly man who for many years had towed stranded motorists into town.

While waiting, I visited with many of his customers and found that he had a reputation as a good samaritan and would sometimes not even charge poor people for towing if they were obviously desperate. The state of Colorado sent inspectors to his station and in accordance with the laws they had passed, prevented him for offering towing services any longer by requiring him to spend thousand of dollars of extra equipment he was unable to afford.

The net effect is that only a couple of companies were in the towing business and only one of these was available to tow me in and change my tire. The price for a 20 mile tow and change of tire was $137.50 because of the monoploy that the government regulations had effectively given them solely on the basis of how much money they had to enter and control the business.

This effect is seen in every industry and every part of american life. The rules are being written to partition off all the fields of business in america creating a country where only rich people have equal opportunity amongst themselves and all other americans become indentured servants or slaves to those with wealth and power.

3. A few days ago, I was travelling to a gun show and became stuck in a traffic jam in Chattanooga. They had funneled four lanes of traffic into one for major replacement of part of the interstate. It was hot and humid, I had no air conditioning, and my patience had reached its end so I became Darwinian in my thinking. I finally decided that if they ask me why I wrote this book I would tell them "to reduce traffic congestion". You see. I can still use humor to fight back.

In the end, Washington and all the state governments need to know that they cannot simply write laws and expect to control and regulate all of the people and their lives. The people can in fact, finally refuse to obey and live by their rules any longer. The power of the government to send masked police, or even the army into peoples homes, has up to this point in time given them the power to impose their rules on everyone. There is only one way to balance this power and that is to make sure that the citizens have such knowledge in their possession that the power of the police and the army effectively becomes irrelevant. On that day, this government will have to find new rules that are in fact just for everyone, not just the ones who fund their election campaigns.

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Protective Measures

Y. Pestis is easily killed by common disinfectants and pasteurization. Sulfadiazine appears to be as effective as the often used antiplague serum. Streptomycin, chloramphenicol, and tetracycline are also effective if administered at the onset of fever. In pneumonic plague where the infection usually begins at just one site, the use of tetracycline has had some success. Therapy must be delivered early (within the first 15 hours) and last at least ten days in order to be effective.

Rat and flea control are the most important defense during epidemics since this is the primary means of spread. The thermal death point is 55 C in 15 minutes and the organisms die quickly when subjected to drying. It is killed in sunlight, hot summer temperatures which often mitigate the spread of plague, and is killed in .5% phenol in 10-15 minutes.

Plague vaccine has been widely used for prophylactic purposes and is made growing P. pestis for four weeks at 27 C in digest broth. Phenol at .5% is added as a preservative as the culture is heat killed. Injections of 1 and 2 ml are given at 7-10 day intervals. The protective value given is modest. Living, non virulent strains seem to work a little better and the plague vaccine used for American soldiers in Vietnam seemed to give solid immunity in all cases of bubonic plague but not the pneumonic form where its effects seem short lived. Recovery from plague infection also appears to give strong immunity to subsequent infection.

Anti plague serum also affords some protection and is used by health workers for temporary protection when caring for plague victims.

Y. enterocolitica is generally sensitive to chloramphenicol, colistin, gentamicin, kanamycin, and streptomycin. Y. pseudotuberculosis is susceptible to kanamycin, streptomycin, and tetracyclines.

Incorporation into Weapons

Candidate samples can be grown in sealed containers in 3% salt agar to observe involution, in broth to check for chain formation and under oil for stalactite growth and granules. Once confirmed by animal tests, you now have a true weapon of mass destruction.

Organisms that are imbedded into protein or pus survive well and this makes excellent carrier states for the organism. Adding protein or pus to dust inhalation weapons allows for both preservation and enhanced growth upon delivery. Adding sodium bicarbonate to the mix also increases preservation of the organism and enhances its infectibility in the target. The dust must be kept moist in order for the organism to survive. The organisms can survive for long period as long as they are kept moist and cool. They store well in refrigerators for long periods as long as they are kept moist.

Y. pestis usually does not survive long outside a living host and disappears rapidly from and buried cadavers but is known to survive for some time in soils with organic material (proteins) and moisture.

Aerosols also are a good delivery strategy and are more effective than dusts when a low micron size "fogger" is used.

It is important to make the organism resistant to the various antibiotics (especially tetracycline's) listed above in order to have the most effective weapon. This can be accomplished by plasmid exchange with other resistant species by growing together in broth or by accumulating mutations that grow nearest the combinations of drugs on culture media as described earlier in the book.

The use of fleas or flea eggs imbedded in blood media and organisms allow for the use of remote delivery of the organism and its natural vectors by mail and other remotely transported methods. The preparation of blood cultured liquid Y. pestis with eggs can be made in "Salt shaker" apparatus

that can easily be attached to the underside of vehicles with magnets and carried into the target area by trusted workers. [This method is called reverse conscription in which the enemies conscripted workers and soldiers can unknowingly be conscripted by you to fight against their own organizations for you. If governments can force their own people to fight for them and uphold their tyranny, then you certainly can do it as well.]

It is recommended that Y. pestis be used in cocktail weapons where multiple organisms can act together to increase each others invasiveness and help break down host defenses. The use of all 3 strains of Y. pestis or all 3 species of Yersinia along with other organisms should overcome vaccine defenses. The use of cholera in these combinations is not advised.

[Authors Note: In conversations with federal undercover agents, I have frequently been told euphemistically that "they can kill you whenever they want" which obviously is intended to mean the US government. My response so far has generally been to tell them that I could kill them six months after I am dead with nothing more than a Christmas card with anthrax and poison ivy, or flea eggs, blood Jell-O and plague. The ultimate weapon that citizens can use against a tyrannical government is not only the knowledge of how to recover, grow and deliver these diseases as a weapon, but to be able to arm and equip an entire army with this ability.

Imagine if the students at Tianenman square had a single leader who knew how to grow the plague which is endemic in much of China. All he would have to do is send a thousand letters with a set of instructions like these, to students all over the country. The only difference is that he could add a small sample of the organism under clear tape to use as the starter culture. By this method you can quickly arm and equip an entire army overnight with self reproducing ordnance. You can also drop the letters as leaflets into a controlled area of the general population.

The net effect is that you now have an army armed with invisible and self reproducing bullets. The only safe people in the government are those living in space suits since any vehicle, piece of mail, package, or object can be easily infected. Those in government who think they can control a population with police or an army can be easily disposed of, as well as their army. The simple idea of anthrax or plague on a tree branch with poison ivy or itching power, or on dust inside of a sealed drawer in your home can instill fear and death in the enemy. These make easy, lethal, invisible, reproducible, and highly effective booby traps that the enemy cannot easily associate with any particular person or location. And they can be killed by the thousands just by the act of brushing against a tree branch in the wrong area.

If the US government, or any government for that mater, thinks they can disarm and regulate every aspect of their citizens lives simply because they can take away their subjects money and use it to hire an armed system of police and army to enforce their rules, they are in for a rude awakening. Most people in a society follow the rules either out of fear of the law, or respect for it and their fellow man. The experiences of my life have proven over and over repeatedly that the laws of the United States (and many other countries) don't even mean anything. Even the US Bill of Rights amount to little more than a bunch of worthless words on a piece of paper. That is why I have written this book. The people of this country and not a lot of bought and paid for politicians who write "Jim Crow" financial and property ownership laws will decide under what rules we are going to live. Even the ability to raise vast sums of money and hire huge armies isn't going to protect unjust governments anymore. The only thing that can protect them now is fair laws that people can live with. If the laws of this nation are not going to be fair then it is my right, and my duty to fight

this government any way I can, even if it costs me my own life. Writing this book is one way of fighting their tyranny. There are many other ways as well.

- Tim Tobiason]

three authorization letters. The first letter is dated June 18, 1998 for – I'm sorry, '99, for Special Agent Vick, the second is a letter authorizing the limited testimony of Agent Seck, and the third is a letter dated today's date which supplements or is an addendum to the prior two authorization letters. And this witness and Agent Vick will be allowed only to testify in accordance with the authorization and not outside of that authorization.

Q. (By Mr. Hollis) Okay. Could you please state your name for the record?

A. It's William, middle initial's R, last name Seck, S-e-c-k.

Q. And you are an FBI agent?

A. That is correct.

Q. You office out of Wichita?

A. Yes, sir.

Q. And what's your relationship with Agent Vick?

A. I am his immediate supervisor.

Q. Okay. Did you work with Agent Vick in the summer of 1998?

A. Yes, I did.

Q. And you were familiar with his investigation which involved communicating with Dan Rupp?

A. Yes, sir.

Q. And did you have occasion to talk with David Phillips at any point in time with respect to Mr. Rupp?

A. Yes, sir, I did.

Q. And how many conversations did you have?

A. One, as I recall.

Q. Can you tell me what you recall that you said and he said in that conversation and what was – who called who?

A. I called him.

Q. And what was the purpose of the call?

A. The purpose of the call was to – in an effort to have a face-to-face meeting with him when it became apparent to me that there was some maybe perceived difficulties, the fact that Mr. Rupp I guess had run into problems with his – with his own agency because of his cooperation with the FBI, and I just thought it would be appropriate to broach hm and see if he would like to meet face-to-face.

Q. Can you tell us, the Court and the jury, what you recall Mr. – you said and Mr. Phillips said when you talked with him when you called him? And when was the conversation?

A. My recollection was September 23rd of 1998.

Q. Okay. Can you tell the Court and the jury what was said by you and by him?

A. I called him. I identified myself. I don't think I had met him previously. I identified myself, told him that the reason I was calling was because the word had got to me as a supervisor that there were some – there may be some problems because of Mr. Rupp's cooperation in our investigation. I recall telling him that – that we believe the information was important, that we were appreciative of Mr. Rupp coming forward with that information.

Q. What information?

A. Just the information he was providing regarding Mr. Tobiason, you know, could have a public safety issue involved, that we were concerned, and that if he was concerned that Mr. Rupp would be acting in capacity

of doing something operational, that being wearing a wire or some kind of body recorder, was not an issue because we had only opened him up as a cooperating source or informant and such in that capacity we would not be asking him to do those things, only provide information. That's really all I recall about the conversation. It was apparent that Mr. Phillips really didn't want to discuss it over the phone and really wasn't interested in meeting me in person. He was very cordial. He was very professional. He listened patiently and I probably repeated my story maybe one more time and it was thanks, but no thanks, and the conversation ended.

Q. And what had Dan Rupp done with respect to the investigation of Mr. Tobiason that you refer to that you felt implicated a public safety issue?

A. Well, I don't know if I'm comfortable answering that. Because of the scope of my conversation with Mr. Phillips over the phone, it was my understanding this is what I would be talking about here this morning.

MS. KARLIN: For the record, the authorization only allows Mr. Seck to testify about the information that he provided to Defendant Phillips and the information that Mr. Phillips provided back to him.

MR. HOLLIS: Okay. Well, with that restriction in mind, I have no further questions.

And if you want to ask some questions,

Supreme Court, U.S.
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In The

Supreme Court of the United States

K. DANIEL RUPP,

Petitioner,

v.

DAVID PHILLIPS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Tenth Circuit correct to hold that Respondent's interest in providing efficient and effective legal representation to indigent clients (and in maintaining the integrity of the FPD's office) outweighed Petitioner's unnecessary, deceptive, and disruptive involvement in an FBI investigation?

2. Was the Tenth Circuit correct to hold that, by Petitioner's own sworn testimony, there was no genuine issue of material fact that would preclude Summary Judgment?

PARTIES TO PROCEEDING

The parties to the proceedings below were the Petitioner K. Daniel Rupp and the Respondent David Phillips.

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STATEMENT OF THE CASE

This is an individual capacity, First Amendment, free speech *Bivens* case. The case arises out of the 1998 termination of Petitioner K. Daniel Rupp (hereinafter referred to as "Rupp" or "Petitioner"), a former employee of the Wichita, Kansas, office of the Federal Public Defender ("FPD"). Petitioner was terminated by Respondent David Phillips ("Phillips" or "Respondent"), the FPD for the District of Kansas, because of Petitioner's deceptive and disruptive behavior. Petitioner filed suit against Respondent solely in his individual capacity.

In his Writ, Petitioner states that he reported to the FBI what he believed to be a "real and imminent threat to public safety" by Timothy Tobiason. Writ, at pg. 2. Petitioner then "communicated with Tobiason, attempting to persuade him not to resort to drastic measures." *Id.* In this context, Petitioner incorrectly states that he "was terminated by Respondent Phillips, on the grounds that these communications violated an order prohibiting Rupp's cooperation with the FBI." *Id.* This statement is a glaring mischaracterization of the facts – a tactic that fooled neither the district court nor the Tenth Circuit Court of Appeals.

Petitioner would have the Court believe that his initial report to the FBI regarding Tobiason was one of the bases for his termination. Nothing could be further from the truth. Petitioner himself testified that he was commended by Phillips for reporting Tobiason's threats to the FBI. Thereafter, Petitioner was simply and unequivocally instructed that he could not continue to be involved in any FBI investigation because of the inherently adversarial relationship between the FPD and the FBI.

Petitioner attempts to create an issue of fact regarding the instructions he received; he contends that Respondent told him only that he could not be a witness for the FBI. The uncontroverted evidence does not support Petitioner's contention. Petitioner admits that he was instructed that he could not be – and promised the FPD that he would not be – involved in an FBI investigation of Tobiason. Petitioner also admits that he was told that he could lose his job if he participated in the FBI investigation. Petitioner promised the FPD that he would not be involved in the investigation. Despite his assurances to the contrary, Petitioner intentionally deceived Respondent by actively and surreptitiously participating in the FBI investigation during the summer of 1998. As a result, he was fired.

Petitioner's deliberate actions disrupted the operations of the FPD by creating a conflict of interest, a breach of trust, and an atmosphere where Petitioner could not be trusted to do what he was told or to keep sensitive information confidential. Respondent reasonably made the decision to terminate Petitioner's employment.

The District Court granted Respondent's Motion for Summary Judgment as to all of Petitioner's causes of action. The Tenth Circuit Court of Appeals affirmed, holding that Respondent's "substantial" interests outweighed those of Petitioner under the *Pickering* balancing test. The Tenth Circuit did not address the issue of qualified immunity.

For the reasons discussed below, none of the issues raised in Petitioner's brief have merit. The grant of Summary Judgment to Respondent was justified based on the uncontroverted facts presented to the Court.

A. Facts Material to this Court's Consideration of the Questions Presented.

The Federal Public Defender, the FBI, and Petitioner.

The Federal Public Defender ("FPD") "exists to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act, and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services." (Resp. App. 70.)

Petitioner began his employment as an investigator for the Wichita Office of the FPD in December 1994. (Resp. App. 1.) At all times, Petitioner was an at-will employee. (App. F-13, ¶ 82.) At the time in question, his immediate supervisor was Cindy McNorton, who reported to David Phillips, the Federal Public Defender for the District of Kansas. (Resp. App. 1-2, 71.) In Petitioner's job as FPD investigator, he was to investigate allegations of crimes made against the individuals defended by the FPD. (Resp. App. 30-31.)

The Federal Bureau of Investigation ("FBI"), on the other hand, is a law enforcement agency of the federal government that performs investigations to collect facts and evidence for use by the U.S. Attorney's office in prosecution of federal crimes. (Resp. App. 40.) The FBI employs approximately 27,000 people in offices in the United States and around the world; its annual budget is in the billions. (Resp. App. 37.) The FPD and the FBI are generally adversarial as the FPD often defends the individuals who the FBI has investigated on behalf of the U.S. Attorney, the prosecutor. (Resp. App. 35-36.)

At the time in question, the FPD had in effect its Personnel Policies and Procedures Manual ("Manual"), the purpose of which was to "provide a written guideline

of personnel benefits and responsibilities as well as clear definition of general office policies." (Resp. App. 69.) Petitioner received and signed off on a copy of the Manual. (Resp. App. 2.)

The Manual contains the Code of Conduct for all Federal Public Defender employees. (Resp. App. 72-73.) This code states: "In assessing the propriety of one's proposed conduct, a defender employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations." (Resp. App. 73.)

Petitioner Becomes Acquainted with Tobiason.

Petitioner "is an avid gun collector and frequented area gun shows in his spare time." (App. F-2, ¶ 7.) Sometime in early to mid 1997, Petitioner became acquainted with Timothy Tobiason, a vendor who had an interest in, and was selling printed materials on, the design and manufacture of biological and chemical weapons. (App. F-2, ¶ 8-9.) Petitioner again met with Tobiason at a gun show in Wichita, Kansas, on June 6, 1998, when Tobiason made statements suggesting that he had actually created nerve agents in small quantities.[1] (App. F-3, ¶ 15, F-6, ¶ 20.)

---

[1] FBI Agent Paul Vick specifically testified that it is illegal "to generate biological agents and then to threaten or to kill or harm people. It has to be a combination of both." Therefore, creating nerve agents is not "a violation of the law." (Resp. App. 34.)

Respondent Commends Petitioner for Providing Information to the FBI; Specific Instructions Given.

On June 8, 1998, Petitioner contacted the Alcohol, Tobacco & Firearms Bureau regarding Tobiason. (Resp. App. 4-5; App. F-7, ¶ 29.) Petitioner was referred to the FBI where he met with Agent Vick and discussed his conversations with Tobiason. *Id.* They also discussed possible scenarios in which Rupp would get more information from Tobiason. (Resp. App. 20-21.) These conversations with Vick occurred before Petitioner discussed the situation with anyone at the FPD's office. (Resp. App. 14.)

On Tuesday, June 9, 1998, Sharon Aldridge, an assistant paralegal in the Wichita FPD's office, called McNorton and asked if she had heard about Petitioner's involvement with the FBI; McNorton had not. Aldridge said she had tried to get him to call either McNorton or Phillips. (Resp. App. 16-17.) Shortly thereafter, McNorton called Phillips. (Resp. App. 18, 42.) Phillips commended Petitioner for informing the FBI about Tobiason. (Resp. App. 3-4, 42-43.) However, he said that Petitioner should not be involved in any further investigation. (Resp. App. 18, 42-43.)

Petitioner Promises Respondent that he will not be Involved in the Investigation.

McNorton told Phillips that Petitioner was planning to go to a gun show that weekend and potentially wear a device to surreptitiously record his conversation with Tobiason. Phillips said he knew nothing about this and asked McNorton to call Rupp. (Resp. App. 18.) Phillips and McNorton discussed the concern that this could defeat the trust or confidence that their criminal defendant

clients had in the FPD's office. (Resp. App. 19-20, 42-43.) Phillips said that the FBI had professionals who were more qualified to do this than Petitioner. (Resp. App. 43.)

Later that day, McNorton called Petitioner. Petitioner told her about Tobiason's interest in biological weapons, Petitioner's subsequent meeting with the ATF and FBI, and that Tobiason would be attending a gun show in Wichita the following weekend. (Resp. App. 20-21.) Petitioner also told McNorton that he and Agent Vick had discussed possible scenarios of what Petitioner could do to assist the FBI, including wearing a wire so the FBI could monitor his conversation with Tobiason. (*Id.*)

McNorton then called Phillips. They discussed that Petitioner's actions would be a conflict of interest and their concerns about the perception of the FPD's office if Rupp was called as a witness for the prosecution. Phillips told McNorton to instruct Rupp that he could not be working with the FBI and continue his employment. (Resp. App. 21-22, 43.)

McNorton then explained these concerns to Petitioner. She said that the FBI had people who were very capable of handling the investigation. She also told him that if he wanted to continue his involvement with the FBI investigation, he could not continue his employment with the FPD. Petitioner understood this. (Resp. App. 3, 22-23.) Petitioner testified that he understood that he could not be involved in any "substantive investigation" by the FBI. (Resp. App. 3, 9.) Petitioner told McNorton that he "would not sneak around her." (Resp. App. 5.)[2]

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[2] As such, there is no genuine issue of material fact regarding the specific instructions Petitioner received from his supervisors – despite Petitioner's attempts to create such an issue. *See* Writ, at pg. 5, 27-28.

Also on June 9, 1998, Petitioner told Cyd Gilman, an attorney at the FPD's Wichita office, of his desire to work with the FBI on this investigation. Gilman told Petitioner that was a conflict of interest, could destroy the FPD's credibility, and that he could possibly lose his job. She also told him that the FBI was one of the most powerful federal agencies and would have other people who could do this. (Resp. App. 54-55.) Subsequently, Gilman indicated that she could not trust Petitioner to work as an investigator on her FPD cases. (Resp. App. 55-56.)

McNorton talked with Petitioner on June 10, 1998. Petitioner said that he really needed his job and that "they [the FBI] don't need me to do this" but that "I really, really want to do it." McNorton told Rupp that the FBI didn't need him and that if he decided to work with the FBI, he should let her know immediately. (Resp. App. 23.)

Petitioner Intentionally Deceives Respondent.

Later that day, Petitioner told McNorton that he had spoken with Agent Vick. He asked McNorton what his boundaries were. McNorton said Petitioner in no uncertain terms that he was "out" of the investigation, that he could do nothing more on the case. (Resp. App. 7-9,[3] 23-24.) Rupp said that he told the FBI that he would let them know if he heard from Tobiason. McNorton said "No, let us know and we will see how to proceed." (*Id.*)

Phillips' and McNorton's unequivocal instructions to Petitioner were that he could not be involved in the

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[3] Respondent anticipates that Petitioner will argue that there is an issue of fact as to whether McNorton said this. At Petitioner's deposition, however, he testified that he did not recall specifically, but that "I remember something like that." (Resp. App. 7.)

investigation, not simply that he was to refrain from wearing a wire. (Resp. App. 3, 21-24.) Despite these specific instructions – and his promises to McNorton – Petitioner continued to be involved surreptitiously in the Tobiason investigation. (Resp. App. 8-10.)

From the beginning of Petitioner's involvement with the FBI, Agent Vick felt that the investigation and potential prosecution of Tobiason could occur without Petitioner's assistance. (Resp. App. 38.) Even so, Vick instructed Petitioner to keep his involvement confidential from "everyone," including his employer. (Resp. App. 5-6, 34-35.) Although Vick had made an agreement with Petitioner that he would not be called to testify as a witness in regard to Tobiason (Resp. App. 33), no one informed the FPD of this until after Petitioner had been asked to resign. (Resp. App. 37-38.)

At Vick's request, Petitioner wrote to Tobiason expressing a sympathetic attitude and inquiring about Tobiason's next visit to Wichita.[4] (Resp. App. 8-9, 14.) Petitioner did not want the FPD to know that he had written the letter to Tobiason because his job could be in jeopardy. (Resp. App. 5-6.)

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[4] Petitioner allegedly "felt like [he] was the closest person to [Tobiason] and seemed to be one of the few [Tobiason] would talk to." Writ, at pg. 6, *quoting* App. J3. This self-serving statement is sheer speculation and inappropriate for summary judgment. Petitioner has no idea who was "close" to Tobiason or whether the FBI had other individuals meeting with him. Even if no one else was, this does not mean that Petitioner was the only person capable of doing so. This statement is even less credible considering Agent Vick's testimony that Petitioner was unnecessary to the investigation and prosecution of Tobiason. (Resp. App. 38.) And, it is undisputed that Tobiason sold these materials – and had such conversations with Petitioner – in public. (App. C-1-C-10.)"

Disruption to the Office of the FPD.

In mid-June, 1998, Petitioner received a response from Tobiason. (Resp. App. 14.) Tobiason wrote, "I have already decided an effective and quite appropriate solution to both the justice system and govts' (sic) actions." Tobiason also asked Petitioner if he would be at the Wichita gun show, September 11-13, 1998. (Resp. App. 14-15.) Petitioner turned the letter over to the FBI. (Resp. App. 15.) He was asked by the FBI if he would be attending the gun show and, if so, would he assess Tobiason's "state of mind." (Resp. App. 11.)

On September 9, 1998, Petitioner spoke with Aldridge. Aldridge asked what he had planned for that weekend; he replied that he "was going to do a favor for the FBI." Aldridge told Petitioner that he needed to speak with McNorton before he did so. (Resp. App. 10-11.)

The next day, Petitioner told McNorton that he had written a letter to Tobiason and had received a letter in return. He also said that the FBI wanted him to attend the gun show and assess Tobiason's state of mind. *Id.* For the first time, Petitioner told McNorton that he met with the FBI five or six more times during the summer — after he promised that he would not be involved in any further FBI investigation. Petitioner told McNorton that he had discussed various levels of witness protection with the FBI and that the FBI also read "Code Information" to him. Rupp said that he was violating his agreement with the FBI by discussing this with her. (Resp. App. 11-13, 24-26.)

The next day, McNorton participated in a conference call about this situation with Phillips and Charles Dedmon, a FPD attorney in the Topeka office. They discussed that they had attempted to correct the situation when it

arose in June, but Petitioner had disregarded their directive not to be involved with the FBI investigation. McNorton was particularly concerned because Petitioner told her of his continued involvement only after Aldridge had instructed him to do so. McNorton said that she did not see any other option but to terminate Petitioner. Phillips stated that he agreed and that they could no longer trust Petitioner. (Resp. App. 26-29, 44-45.)

Petitioner's actions clearly caused a disruption within the FPD system. In addition to the concerns of Gilman, discussed above, Dedmon testified that Petitioner's actions disrupted the work of the FPD's office. Dedmon stated that he could not use Petitioner as an investigator on sensitive matters because of his deceptive behavior. (Resp. App. 66-68.) Further, the work of the FPD's office was disrupted when McNorton, Dedmon, Aldridge, and Phillips were forced to deal with this continuing situation rather than devote their time to defending their clients and other necessary office tasks. (Resp. App. 16-31, 48-52, 54-56, 66-68.)

Phillips also had concerns regarding how Petitioner's actions would appear to the individuals the FPD's Office represents. FPD clients often assume that the Defender is part of the prosecution because it is a governmental agency. Phillips was concerned that this assumption would be aggravated if clients became aware that a FPD employee assisted in an FBI investigation. (Resp. App. 47.)

Petitioner went to the gun show that Saturday and Sunday and spoke with Tobiason. (App. F-10, ¶ 53; Resp. App. 10.) Petitioner did not tell Tobiason that he was working with the FBI. Tobiason was aware, however, that Petitioner worked for the FPD. (Resp. App. 13.) On the following Monday, September 14, 1998, Petitioner again

met with Agent Vick and told him what Tobiason had said. (App. F-12, ¶ 70.)

Petitioner is Fired because of his Deception.

That same day, Phillips, Dedmon, and McNorton traveled to Wichita to meet with Petitioner. (Resp. App. 29-30.) Phillips told Petitioner his continued undercover participation in the investigation gave them no choice but to terminate his employment. (Resp. App. 13, 52-53.) Petitioner was given the choice of resigning or being terminated. (Resp. App. 52.)

It was irrelevant to the FPD whether Petitioner attended the gun show and spoke with Tobiason that weekend. The real issue was that Petitioner chose to be involved in the investigation after he had been instructed not to be – and after he promised he would not be. (Resp. App. 26-29, 45-47, 52-53.)

In a letter dated September 18, 1998, Phillips reiterated to Petitioner that his continued involvement with the FBI created a breach of trust and an atmosphere where he could no longer be trusted to do what he was told or to keep sensitive information confidential. (Resp. App. 13, 59.) Phillips said that the position of investigator requires a high degree of trust due to the confidential and sensitive nature of the information an investigator must possess to carry out the functions of that position. (Resp. App. 59.)

Petitioner was informed that he had violated the Code of Conduct for FPD employees, specifically Canon 1, Canon 2, Canon 3 A, B, and F. (Resp. App. 59-60, 74-78.) In this regard, the letter stated the following violations by Petitioner:

1. Not personally observing high standards of conduct so that the integrity and independence of the office are preserved and so that the defender office reflects a devotion to serving the public defender's clients and the principle of equal justice under law. See Canon 1;
2. Engaging in activities that would put into question the propriety of your conduct in carrying out the duties of the office. See Canon 2;
3. Not respecting and complying with the canons, by not reporting to your supervising authority any attempt to induce you to violate the canons, and by not being faithful to professional standards and maintaining competence in your profession. See Canon 3A and B;
4. Not avoiding conflicts of interest, and by not advising me of your renewed involvement in the FBI investigation when you knew that such could constitute a conflict of interest in the performance of your duties. You should have observed the restrictions on your activities imposed by me in this regard. See Canon 3F.

(*Id.*) This letter accurately reflects the reasons why Petitioner was terminated. (Resp. App. 47-49.)

The Personnel Manual provides a procedure for FPD employees who want to contest adverse employment action. (App. F13-F14, ¶ 83.) Petitioner appealed his termination pursuant to this procedure. (App. F-14, ¶ 85.) Following the Adverse Action Hearing, Phillips affirmed his decision to terminate Petitioner. (Resp. App. 62-65; App. F-15, ¶ 90.)

ARGUMENT FOR DENYING THE WRIT

Petitioner's Writ is based upon three arguments, all without merit. First, Petitioner refuses to make the distinction between his initial contact with the FBI and his

deceptive and unnecessary actions that followed. The distinction is obvious and has been recognized by the district court, the Tenth Circuit Court of Appeals, and Respondent. Even the FBI has conceded that Petitioner's continued involvement in the investigation was unnecessary.

Second, Petitioner contends that the Tenth Circuit's opinion conflicts with holdings of this Court, as well as the Fifth and Sixth Circuits. When reviewed in context, the cases cited by Petitioner are harmonious with the Tenth Circuit's opinion in the case before the Court.

Finally, Petitioner alleges the existence of "several genuine issues of material fact," which would preclude summary judgment. The alleged issues relate to: 1) the disruption Petitioner caused to the operations of the FPD; 2) the instructions Petitioner received from the FPD regarding his involvement with the FBI investigation; and 3) the importance the FBI placed on Petitioner's assistance. According to Petitioner, the Tenth Circuit did not resolve these alleged inconsistencies in favor of Petitioner.

In reality, Petitioner's sworn deposition testimony verifies that 1) the disruption to the FPD was real and lessened only as a result of Petitioner's continued deception; 2) Petitioner was specifically instructed – and he agreed – that he could not be involved in the investigation; and 3) that the FBI felt Petitioner's continued involvement was unnecessary. Based upon the uncontroverted evidence and testimony, no genuine issue of material fact exists.

The Tenth Circuit correctly weighed the interests of Petitioner against those of Respondent. As such, the Tenth Circuit upheld the district court's decision to grant summary judgment to Respondent.

I. THE TENTH CIRCUIT PROPERLY WEIGHED THE VALUE OF PETITIONER'S ACTIONS AGAINST THE FPD'S NEED TO ADEQUATELY REPRESENT ITS CLIENTS.

The Court must employ a two-part test when confronted with a plaintiff alleging that the termination of his employment violated his right to free speech. *See Melton v. City of Oklahoma City*, 879 F.2d 706, 727 (10th Cir. 1989). The Court must first determine whether the speech at issue was in regard to a "matter of public concern." If it was not, the analysis stops because the plaintiff has failed to state a cause of action. *See generally Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Under this analysis, the Tenth Circuit held that it need not address the issue of whether Petitioner's continued contact with Tobiason and involvement in the investigation was speech on a matter of public concern. The Tenth Circuit noted "some question as to whether [Petitioner's] later actions may be characterized as 'speech.' "[5] App. A-9 n. 3 (*citing Horstkoetter v. Dept. of Public Safety*, 159 F.3d 1265, 1272 n. 3 (10th Cir. 1998)). Regardless, the Tenth Circuit held that "any ambiguity as to the status of [Petitioner's] actions under the first part of the *Pickering/*

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[5] Although not an issue on appeal, Respondent strongly contends that Petitioner was not terminated as a result of "speech" on a matter of public concern. Petitioner deceptively assisted in an investigation conducted by an agency whose function diametrically conflicted with the agency by which he was employed. He deliberately and knowingly defied direct and reasonable orders – and knowingly lead his employer to believe that he was following that order. *This* was the reason Petitioner was fired, not for any views he expressed or comments he made on a matter of public concern. *Compare generally with Pickering*, 391 U.S. 563; *Connick*, 461 U.S. 138.

Connick test is of limited significance, because there is no uncertainty regarding the legal resolution of the second part of that test." App. A-9. As to the second part of the balancing test, the Tenth Circuit held that Respondent's interests in maintaining the effectiveness and integrity of the FPD's office outweighed those of Petitioner in unnecessarily and deceptively continuing in the FBI investigation.

A. Petitioner Improperly Refuses to Distinguish Between his Initial Contact with the FBI and his Continued, Deceptive, and Unnecessary Involvement in the Investigation.

Initially, Petitioner infers that only he, by his actions, recognized the importance of public "security." Writ, at pg. 15. As the record unequivocally shows, nothing could be further from the truth. The district court, the Tenth Circuit Court of Appeals, and Respondent all recognize the importance of public security. Further, all recognized the value of Petitioner's initial contact with the FBI. It is undisputed that Respondent commended Petitioner for taking this information to law enforcement officials. (Resp. App. 3-4, 42-43.) The Tenth Circuit stated that Petitioner's "*initial* contact with the FBI did reveal new information to the public, and so may have been entitled to greater weight under the balancing test."[6] App. A-12 (emphasis in original).

Petitioner's argument fails because he refuses to distinguish between his initial contact with the FBI and his deceptive and unnecessary involvement in the investigation. This distinction has been recognized by Respondent,

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[6] This initial contact was not analyzed further by the Tenth Circuit because it was not at issue between the parties.

the district court, the Tenth Circuit, *and* by the FBI. "[O]nce [Petitioner] had tipped the FBI, it was certainly capable of carrying on an investigation of Mr. Tobiason with or without [Petitioner's] help. Indeed, Agent Vick testified to this fact." App. A-12.

B. The Value of Petitioner's Actions to the FBI Does Not Outweigh Respondent's Interests.

Petitioner argues that "the interests of the listeners of Petitioner's cooperative statements – FBI agents acting on behalf of the public – were left out of the Tenth Circuit's equation." Writ, at pg. 16. Petitioner cites two cases to support his contention that his "continued cooperation" with the FBI "should have been highly valued" because of his alleged importance to the FBI. *Id.*

Respondent does not dispute that *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972) and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-7 (1976) support the proposition that the "right to receive" information is also protected by the First Amendment. Even so, both cases cited are distinguishable from this situation. In both *Kleindienst* and *Virginia State Bd. of Pharmacy*, the "listeners" were parties to the litigation – not so in the case at bar. These cases also dealt with the dissemination of information to the public at large – an element also missing from the case at bar.

Regardless, the value to the "listeners" will not tip the balance in favor of Petitioner given the undisputed testimony in this case. FBI Agent Vick specifically testified that Petitioner's cooperation in the investigation was unnecessary. Resp. App. 38. Petitioner cannot in good faith argue the importance of his continued involvement in the FBI investigation.

C. The Tenth Circuit Opinion Will Not "Chill" Citizen Cooperation with Law Enforcement.

Petitioner argues that the Tenth Circuit "impermissibly chills valuable speech" because citizens will not be able to determine if their "cooperation is 'imperative' or 'irreplaceable.' " Writ, at pg. 17. Again, Petitioner ignores the distinction between his initial contact with the FBI and his continued involvement in its on-going investigation. As the Tenth Circuit stated, "nothing in [this] decision discourages, much less prohibits, [Petitioner's] original contact with the FBI. As such, it is unlikely to cause significant avoidance and error costs."[7] App. A-13, n. 4. Although Petitioner refuses to see this distinction, it was obvious to the district court, the Tenth Circuit, and Respondent. It is safe to say that this distinction will be obvious to citizens wishing to provide information regarding criminal investigations.

In addition, this decision will have little or no bearing on the typical United States citizen. Petitioner's situation was unique from that of the average citizen because he was employed by the FPD – an agency with an adversarial relationship to the FBI as well as a duty of propriety and confidentiality to its clients who are investigated by the FBI and/or charged with crimes.

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[7] Further, Petitioner was simply instructed to bring new information to the FPD before going to the FBI. (Resp. App. 24.)

II. THE TENTH CIRCUIT OPINION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER CIRCUITS.

A. Both the Sixth and Tenth Circuits Acknowledge that "Initial" Speech May Be of "Greater Concern to the Public."

Petitioner next argues that the Tenth Circuit opinion has created a conflict with the Sixth Circuit opinion of *Chappel v. Montgomery County Fire Protection*, 131 F.3d 564 (1997). Writ, at pg. 19. Petitioner contends that the Tenth Circuit created a distinction between "old and new speech," giving greater protection to "new" speech. *Id.*

Petitioner's reliance on *Chappel* is misplaced. In that case, a plaintiff alleged retaliation because of whistleblowing complaints he made regarding corruption in the public agency in which he worked. In that context, the Sixth Circuit rejected the idea that the speech of such an employee is unprotected merely because it "comes late to a public debate," after "the controversy has already been defined." *Id.* at 577.

Chappel specifically relied on this Court's *Connick* and *Pickering* opinions to recognize the importance of the "unfettered *interchange* of ideas" and "free and open *debate* . . . vital to informed decision-making by the electorate." *Id.* (emphasis in *Chappel*) (internal citations omitted). *Chappel* is clearly distinguishable from the situation facing the Court. Petitioner was not "fettered" in his attempt to exchange ideas, nor was he foreclosed from engaging in "free and open debate."

Chappel held in no uncertain terms "that speech which breaks a story may be of greater concern to the public . . . " *Id.* As such, there is no conflict between the Tenth Circuit's opinion and the Sixth Circuit in *Chappel*.

Consistent with *Chappel*, the Tenth Circuit held that Petitioner's "*initial* contact with the FBI . . . may have been entitled to greater weight under the balancing test." App. A-12 (emphasis in Tenth Circuit opinion). Petitioner's unnecessary continued involvement with the FBI, while protected, "did not implicate the same level of public concern . . . " *Id.*[8]

This diffuses Petitioner's argument that the "Tenth Circuit repeatedly diminished the importance of [Petitioner's] speech because it did not involve complaints of official wrongdoing." Writ, at pg. 20. According to Petitioner, the Tenth Circuit gave greater importance to government workplace whistleblowing than to providing information to law-enforcement.[9] Petitioner mischaracterizes the Tenth Circuit's holding. The importance of his initial contact with the FBI was not "diminished" by the district court, the Tenth Circuit, or Respondent. As stated above, the Tenth Circuit held that Petitioner's initial contact with the FBI may have been entitled to protection similar to that given to whistleblowers[10] – but his continued, unnecessary and deceptive involvement in the FBI investigation is not entitled to the same heightened level of protection. App. A-12.

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[8] The Tenth Circuit also noted that "[t]here is also some question as to whether [Petitioner's] later actions may be characterized as 'speech.' " App. A-9, n. 3.

[9] Petitioner infers that the Tenth Circuit was incorrect to compare his actions with whistleblower cases. The Tenth Circuit did so, however, because Petitioner cited such cases cited in his Tenth Circuit brief.

[10] Again, the Tenth Circuit did not analyze this because it was not at issue.

B. The Tenth Circuit Did Not Categorically Prohibit Speech that Conflicts with the Employer's Interests.

Petitioner next contends that the Tenth Circuit opinion conflicts with both this Court and the Fifth Circuit by allowing "categorical prohibitions on speech that might conflict with the interests of the employer." Writ, at pg. 21. Again, Petitioner's argument is based on a misinterpretation of the cases he cites.

In *Hoover v. Morales*, the defendant state university instituted a policy under which university professors and state employees were prohibited from serving as expert witnesses or consultants for litigants that opposed the state. 164 F.3d 221 (5th Cir. 1998). "Boiled down to its core, the State is simply arguing that the State's interest is in preventing state employees from speaking in a manner contrary to the State's interests." *Id.* at 226. *Hoover* is distinguishable because the purpose of the defendant university's policy was to protect the defendant university. In the case before the Court, the FPD was concerned about the representation of its indigent clients.

The *Hoover* court described the State's identified interest "amorphous." *Id.* It held that the State failed to specify "how the State's interest in promoting efficiency of the public [educational] services it performs . . . will be adversely affected by allowing state employees to serve as or be retained as expert witnesses or consultants." *Id.*

The interests and disruption identified by the FPD in the present case are anything but "amorphous." Respondent specifically identified how Petitioner's actions adversely affected the workings of the vital public service performed by the FPD. FPD employees testified about the extensive discussions that occurred in September 1998

after Petitioner finally confessed to McNorton and Phillips at the urging of Sharon Aldridge. Attorneys stated that they would no longer work with Petitioner. (Resp. App. 53-56, 66-68.) Employees legitimately felt that they could not trust Petitioner after he actively and intentionally deceived them. (*Id.; see also* 16-31, 48-52, 54-56.) The disruption was real and Respondent had every right to alleviate the situation before it escalated to the point where the FPD was unable to adequately represent its clients. This is especially true considering the importance of the service provided by the FPD.

To the degree that the disruption to the FPD was arguably "minimal" in the summer of 1998, it is because Petitioner misled his coworkers to believe that he was no longer involved in the FBI investigation. Once Petitioner misled the FPD employees that he would not be involved in the FBI investigation, the FPD employees reasonably believed they had no basis for concern. Therefore, Petitioner's deception was the only reason the disruption was abated during the summer of 1998. Allowing Petitioner to rely on a lack of disruption during this time period would be rewarding him for his deceitful behavior.

For these reasons, Petitioner's reliance on *U.S. v. National Treasury Employees Union* is equally misplaced. 513 U.S. 454 (1995). In that case, this Court specifically held that the government may take adverse action based on "employee speech that has adverse effects on 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 513 U.S. at 467, n. 11 (citation omitted). The Court also reiterated that the employer must demonstrate real harm. *Id.* at 475. As stated above, this is exactly what

Respondent has done. As discussed in the following section, this analysis is consistent with other holdings of this Court.

Respondent and other FPD employees had legitimate concerns that the impropriety of Petitioner's actions would adversely affect their credibility with their clients. Such concerns were proactive. Respondent was attempting to avert an ethical and client relations disaster before it occurred. Petitioner infers that Respondent had some sort of duty to retain Petitioner as an employee until he had adequately disrupted the workings of the FPD and damaged client relations beyond repair. *See* Writ at pg. 21 – 24. This argument is ludicrous. *See Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995) (holding that the government does not "have to wait for speech actually to disrupt core operations before taking action.")

Petitioner's deception of Tobiason shows that Respondent's concerns were justified. Petitioner exploited his position with the FPD during his conversations with Tobiason. Petitioner said that he was employed by the FPD, but *did not* tell Tobiason that he was working with the FBI. (Resp. App. 13.) If made public, FPD clients would logically assume that their FPD investigator could also be working for the FBI, like Petitioner.

The Tenth Circuit has specifically held that actual disruption may be shown by reasonable predictions of disruption. *Janzten v. Hawkins*, 188 F.3d 1247, 1257-58 (10th Cir. 1999). *See also Cragg v. City of Osawatomie*, 143 F.3d 1343, 1347 (10th Cir. 1998). Regardless, once Petitioner's deception was exposed, the evidence is clear that the disruption to the FPD's office was tangible. Petitioner's argument conveniently ignores the substantial uncontroverted testimony regarding the specific disruption to the FPD. (Resp. App. 16-31, 48-52, 54-56, 66-68.)

C. The Tenth Circuit Opinion Is Consistent with Supreme Court Authority.

The Tenth Circuit was squarely in-line with *Pickering*. 391 U.S. 563. According to *Pickering*, the Court must "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

1. Government employers have the right to restrict the speech of their employees.

Public employment cannot be conditioned "on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. at 146. Even so, the government, as an employer, has the right to control certain aspects of employee speech. In fact, "the government as employer indeed has far broader powers than does the government as a sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (*citing Pickering*, 391 U.S. at 568) (other citations omitted).

"This assumption is adequately borne out by considering the practical realities of government employment, and the many situations in which, we believe, most observers would agree that the government must be able to restrict its employees' speech." *Id.* at 672.

> The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just

> in the name of efficiency. **But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.**

Id. at 675 (emphasis added).

2. Petitioner's actions fly in the face of "promoting efficiency" of the Federal Agency for whom he was employed.

Again, Respondent agrees that it was appropriate for Petitioner to provide the initial information regarding Tobiason to the FBI. Petitioner's continuing involvement in the FBI investigation while deceiving his employer cannot, however, be said to be of great importance. *See Chappel*, 131 F.3d at 577. Regardless of Petitioner's opinion regarding his relationship with Tobiason, FBI Agent Vick testified that Petitioner was unnecessary to the investigation and potential prosecution of Tobiason. (Resp. App. 38.)

Petitioner's continued involvement with the FBI created a devastating breach of trust. Petitioner deliberately defied a direct and reasonable order from his employer. He knowingly and deliberately misled his employer about his action, which clearly violated the Canons 1, 2, and 3 (A), (B) and (F) of the FPD's Code of Conduct. (Resp. App. 59-60, 74-78.) His actions flew in the face of "promoting the efficiency" of FPD's public services.

In the present case, Respondent's "valid state interest" is undeniable – "to ensure the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act, and other congressional mandates on behalf of those who cannot afford to retain counsel and other necessary defense services." (Resp. App. 70.) To perform these vital

services, the FPD *must* maintain independence from federal law enforcement agencies such as the FBI. Respondent's valid state interest clearly outweighs any right Petitioner had to mislead the FPD.[11]

"**When someone who is paid a salary so that [he] will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain [him].**" *Waters*, 511 U.S. at 675 (emphasis added). Respondent attempted to reasonably restrain Petitioner's actions. When Petitioner defied Respondent's reasonable instruction and deceived Respondent, Respondent had no choice but to terminate Petitioner's employment.

D. Petitioner's Actions were Insubordinate.

Petitioner contends that the lower courts failed to "acknowledge Petitioner's considerable evidence that, after receiving his employer's directives, [Petitioner] severely restricted his cooperation with the FBI and declined the FBI request to serve as a confidential informant, to tape record conversations, to become a witness, or otherwise to become an 'undercover' operative in an FBI investigation." Writ, at pg. 13; *see also* Writ, at pg. 8. He refuses to accept responsibility for his actions. His deception was the *definition* of insubordination. The above-quoted reason of Petitioner is akin to saying "I lied, but I could have lied more, so I shouldn't be punished for lying." Petitioner's argument is absurd. The Tenth Circuit recognized this when it stated that Petitioner's "own

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[11] The balance weighs even more heavily in favor of Respondent considering Petitioner's participation was unnecessary. (*See* Resp. App. 36-38, 43, 55.)

statements reveal that he deliberately ignored the instructions of his supervisors." (App. A-14.)

Petitioner admits that he was reasonably and unequivocally instructed that he could not be an employee of the FPD and also be involved in an FBI criminal investigation. (Resp. App. 3, 22-23.) He admits that he was told he could lose his job if he continued to cooperate with the FBI. (Resp. App. 3, 6.) He specifically told McNorton that he "would not sneak around her." (Resp. App. 5.) Despite these clear and unambiguous instructions – and Petitioner's agreement to abide by them – Petitioner deceived his employer and coworkers. Respondent was justified and the Tenth Circuit was correct to grant summary judgment.

III. THERE IS NO GENUINE ISSUE OF MATERIAL FACT.

Petitioner's final reason for granting the Writ alleges the existence of "several genuine issues of material fact," which would preclude summary judgment. Writ, at pg. 27. The alleged issues involve: 1) the disruption Petitioner caused to the operations of the FPD; 2) the instructions Petitioner received from the FPD regarding his involvement with the FBI investigation; and 3) the importance the FBI placed on Petitioner's assistance. According to Petitioner, the Tenth Circuit did not resolve these alleged inconsistencies in favor of Petitioner.

As the record clearly shows, there is no genuine issue of material fact. Petitioner's sworn deposition testimony verifies that 1) the disruption to the FPD was real and lessened only as a result of Petitioner's continued deception; 2) Petitioner was specifically instructed – and he agreed – that he could not be involved in the investigation; and 3) that the FBI felt Petitioner's continued

involvement was unnecessary. As such, the Tenth Circuit was correct to grant summary judgment.

A. Petitioner's actions were disruptive to the FPD.

Petitioner contends that the Tenth Circuit misapplied Fed.R.Civ.P. 56 on the issue of disruption to the FPD. Petitioner argued that "the Tenth Circuit resolved whether [his] speech was actually disruptive by focusing exclusively on evidence favorable to the movant, and in disregard of evidence offered by the non-movant." Writ, at pg. 27. "Under fundamental principles of civil procedure embodied by Rule 56," stated Petitioner, "the availability of summary judgment does not turn on whether a *movant* can introduce evidence; it turns on whether the non-movant cannot." Writ, at pg. 27.

Petitioner is partially correct. Rule 56 does revolve around the non-movant's ability to provide evidence contradicting the movant's Motion for Summary Judgment. If, however, the movant initially comes forth with evidence to support the Motion, "an adverse party **may not rest upon the mere allegations or denials of the adverse party's pleading,** but the adverse party's response, by affidavits or as otherwise provided in this rule, **must set forth specific facts showing that there is a genuine issue for trial.**" Fed.R.Civ.P. 56(e) (emphasis added). According to the Rule, summary judgment "**shall be entered**" if the nonmovant fails to so respond. *Id.* (emphasis added).

Respondent has provided the Court with specific evidence of how Petitioner's actions disrupted the FPD's office. (Resp. App. 16-31, 48-52, 54-56, 66-68.) Petitioner contends that the Tenth Circuit "disregard[ed]" his evidence that there was no disruption – without identifying what this evidence was. Petitioner has no evidence to refute the sworn testimony of disruption. He has only his "mere allegations and denials" of disruption. This is why

the Tenth Circuit focused "exclusively" on Respondent's provision of supportive evidence. As such, summary judgment was appropriate under Rule 56.

B. Petitioner Admitted that He Was Aware of the FPD's Instructions.

Petitioner contends that "the Tenth Circuit disregarded an important conflict in the record when it found that [Petitioner] 'deliberately ignored the instructions of his supervisors.' The deposition testimony in the record created a swearing contest regarding exactly what the allegedly insubordinate employee had been instructed not to do." Writ, at p. 27-28.

Any arguable issue of fact that may exist is certainly not "material" and would not preclude summary judgment. Petitioner admitted that McNorton instructed him that he could not continue his employment with the FPD if he wanted to continue his involvement with the FBI investigation. (Resp. App. 3, 22-23.) He testified that he understood that he could not be involved in any "substantive investigation" by the FBI. (Resp. App. 3, 8-9.) He testified that McNorton told him that he could "resign and go work for the FBI," but that his FPD "job is at risk" if he continued to be involved in the FBI investigation. (Resp. App. 3.) Finally, Petitioner admitted that he told McNorton that he "would not sneak around her." (Resp. App. 5.)

There is no genuine issue of material fact regarding the specific instructions Petitioner received from his supervisors – despite Petitioner's attempts to create such an issue. As such, summary judgment is appropriate.

C. Agent Vick Specifically Testified that Petitioner's Involvement Was Unnecessary.

Petitioner's final argument is probably his most desperate. Petitioner contends that

> the Tenth Circuit did not give [Petitioner] the benefit of reasonable inferences regarding the importance to the FBI of his continued cooperation. When [Respondent's] counsel asked Agent Vick whether [Petitioner's] cooperation was 'vital to the prosecution of Mr. Tobiason,' and Vick could answer neither 'yes' nor 'no,' [Respondent's] counsel then attempted to withdraw the question before Vick could elaborate on the reasons for his hesitancy.

Writ, at pg. 28. According to Petitioner, "Vick's response to that question gives rise to an inference that silencing [Petitioner] would cause significant harm to the FBI's ability to achieve its objectives." *Id.*

What Petitioner calls an "inference" is more akin to grasping at straws. Petitioner's counsel on this Writ was not serving in that capacity at the time of Agent Vick's deposition. Possibly, Petitioner's counsel is unaware that the parties had to agree to the FBI's strict restrictions on the subjects about which Agent Vick could be questioned. *See* App. D-3.

At the deposition of Agent Vick, Respondent's counsel had previously asked "Do you feel that the FBI was capable of investigating Mr. Tobiason without the assistance of Mr. Rupp?" (Resp. App. 36.) Before Vick could respond, counsel for the FBI objected that this was "outside the scope" of what Vick was allowed to discuss and instructed Vick not to respond. (Resp. App. 37.) As for the question at issue (App. D-36), Respondent's counsel merely withdrew the question to avoid additional objections and instructions by the FBI's counsel. Petitioner cannot rely on his purely subjective belief as to the reasoning behind the withdrawn question to defeat summary judgment.

The fact remains that Agent Vick specifically testified that the FBI did not need Petitioner's assistance "to continue with any investigation and potential prosecution of Mr. Tobiason." (Resp. App. 38.) Therefore, there is no genuine issue of material fact and the opinion of the Tenth Circuit should be affirmed.

IV. CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court uphold the decision of the Tenth Circuit which granted Respondent summary judgment as to all of Petitioner's causes of action.

Petitioner deliberately and knowingly defied the direct, reasonable, and unambiguous order of his employer the FPD – and intentionally deceived the FPD to believe that he was following that order. *These* are the reasons why Petitioner was fired. Respondent's actions were legal, reasonable, and justified.

The Tenth Circuit's opinion does not conflict with this Court or other Circuit Courts. There is no genuine issue of material fact. The Tenth Circuit correctly held that Respondent is entitled to summary judgment as a matter of law pursuant to Fed.R.Civ.P. 56.

Respectfully submitted,

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Dated: December 10, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plantiff,

No. 99-2101-GTV

vs.

DAVID J. PHILLIPS, in
his personal capacity,

Defendant.

DEPOSITION OF K. DANIEL RUPP, the Plaintiff, taken on behalf of the Defendant, pursuant to Notice, on the 15th day of June, 1999, at the Law Offices of Lee J. Hollis, 5100 West 95th Street, Prairie Village, Kansas, before

ANGIE SHERWOOD, RPR, CSR,

of Hostetler & Associates, authorized by law to take depositions anywhere in the State of Kansas.

* * *

[25] Q. How long did you work for the Public Defender's Office after starting in June of '88?

A. Until December of '94.

Q. Is that when you went to the Federal Public Defender's Office?

A. Yes.

* * *

[30] Q. Who supervised you in the Federal Public Defender's Office?

A. David Phillips and then Cindy McNorton.

Q. Give me the time frame that David Phillips supervised you and then Cindy McNorton?

A. Cindy was near the end of my time there. You know, I don't know exactly what the time frame is but the last year.

* * *

[56] Q. Sometime during your employment with the Federal Public Defender's Office, District of Kansas, you saw a draft of the personnel policies and procedures manual?

A. Yes.

Q. And with regard to your employment there at some time before you were fired you signed off on a personnel policies and procedures manual, true?

A. True.

Q. But your testimony today is you don't [57] remember what that, the contents of any of those were, right?

A. True.

Q. But you do have an understanding of what a personnel policies and procedures manual is, don't you?

A. Yes.

Q. And you had that understanding while you were employed with the public defender, true?

A. Yes.

* * *

[104] Q. So I'm on track then, that at some point after you talked to David Phillips he told you to talk to Cindy. You talked to Cindy on the phone. The conversation with Cindy was one where she threatened your job if you were involved in any way with the FBI investigation of Tobiason. Is that an accurate statement?

A. It's something like that.

* * *

[105] A. I think she said something like this: She said you can resign and go to work for the FBI. I remember that phrase.

Q. Do you recall her saying anything to the corollary of that and, that is, if you work with the FBI you can lose your job?

A. Something like that, sure. I think she may have also said your job is at risk.

* * *

[115] Q. All right. Did Cindy or David say anything about the fact that you had gone to the FBI that you remember?

A. On that day?

Q. Yes.

A. Did David or Cindy say anything else about me going to the FBI?

Q. Did they say anything about your going to the FBI, words to the effect of well, you [116] should have

gone to the FBI or words to the effect of you should have never reported that?

A. I see. David said like well, good, that's good. I sort of like talked to Cindy and I was telling him, I was mostly telling him.

Q. But when you told David that you had gone to the FBI he said good, that's good?

A. Something like that.

Q. And he didn't fire you in that phone conversation?

A. No.

* * *

[118] A. Well, that first day Dennis from the ATF sent me up to Paul Vick's office.

Q. The same day?

A. This is the very first contact Monday morning.

* * *

[120] Q. And the conversations with David Phillips and with Cindy where were you when you talked to them?

A. I think that was my office.

Q. Had you been to the FBI before you talked to them? In other words, had you gone to the FBI?

A. Before I even went to work, yes. On the way upstairs I stopped off at ATF. They sent me to FBI and then I went to work.

Q. And made the calls to David and Cindy?

A. Yeah.

Q. And that was all the same day?

A. I think so.

Q. And it was a Monday?

A. I think so.

* * *

[129] Q. Look at page two, the top paragraph, because I want to ask you about something you say in there. It says midway in that first paragraph "Cindy McNorton told me I could not be a witness in any way in this matter and my job would be at risk if I made myself a witness. I acknowledged that and said I would not sneak around her."

Did you say that in the letter to Mr. Phillips dated September 24?

A. Yes.

Q. Was that your intent to represent to Cindy that you weren't going to sneak around her?

A. Yes.

Q. When did you tell Cindy that you had, [130] in fact, worn a wire – I'm sorry – that you had, in fact, written a letter to Tobiason?

A. Maybe September 11.

Q. Of 1998?

A. Right.

Q. What's the reason you didn't tell her when you did it?

A. I thought I had a perfect right to send a letter to this guy. I was scared to death that there was going to be a catastrophe. She had threatened my job over this deal. I have been asked by the FBI to write this letter. They said don't tell anybody.

Q. Who is "they"?

A. Paul Vick. And I knew at that time I was the only one who was talking to the guy who had any input to him at all.

Q. Did you ask Paul Vick or anyone from the FBI if you could tell Cindy before you wrote the letter? I mean as I understand your recollection, the FBI says don't tell anybody. Cindy has threatened you with your job if you cooperated with the FBI so did you say well, I need to tell my employer?

A. This was after I was writing the [131] letter after agreeing to it? No.

Q. Why not? Why didn't you ask the FBI if you could tell Cindy?

A. After that initial threat I was afraid to say anything to her.

Q. Because you would lose your job?

A. I was afraid of losing my job.

* * *

[132] Q. I'm sorry. June 10 was a Tuesday. June 9 would be Monday. On either that Monday or Tuesday did you talk to her and ask her what the boundaries were and what was over the line?

A. I don't recall that specifically but I'm almost sure I did.

Q. Do you recall her telling you that you were out of the investigation and that the FBI [133] should be left to do their own work and that following your reporting of the incident about Tobiason you didn't need to do anything more in regard to the matter?

A. I remember something like that.

Q. Do you recall Cindy telling you to talk to her or get ahold of her in the event the FBI had any further contact with you?

A. No. All I remember is the no witness.

Q. Look at Exhibit 6 to Phillips' deposition, A01690.

A. Okay.

MR. HOLLIS: What's the question?

MR. RUPE: There isn't a question yet.

Q. (By Mr. Rupe) Have you looked at that page?

A. Yes.

Q. I want to look at the last three lines handwritten. "Told him no, let us know and we'll see how to proceed."

Do you recall Cindy saying anything to you to the effect that you need to let the Federal Public Defender's Office know and we [134] will see how to proceed?

MR. HOLLIS: Object to the reference to a document that is not in evidence.

MR. RUPE: I'm sorry. It's Exhibit 6, the last page.

MR. HOLLIS: Same objection.

THE WITNESS: I'm sorry. I don't recall that specifically.

Q. (By Mr. Rupe) You are not saying she didn't say that; you are just saying you don't remember, right?

A. That's true.

Q. Now, between June 10, 1998 and September 10, 1998 – let's use September 9 as our point of reference. Between June 10, 1998 and September 9, 1998 what involvement did you have with the Tobiason matter?

A. That's after the letter is –

Q. After your conversations on the phone with David and Cindy that we have talked about and before you told Cindy you had had involvement further, between those two bookends, those two dates, what involvement did you have with the Tobiason matter?

[135] A. Say the dates one more time. I'm sorry. Please.

Q. Between June 10, 1998 –

A. And the 9th of September.

Q. September 9, 1998.

A. Paul Vick called, what's going on with your boss, did you tell your boss and I said yes. He said what did

they say, you know, and I go well, they don't want me to be involved in any substantive way in this deal and he said well, do they know that, you know, people could die, that kind of thing, and I said they told me I can't be a witness. And then I said, I said something along the lines of I have to, you know, do what you ask. And he said well, sort of can you write the guy a letter and I said I'm sure that's okay. They can't fault me for that and so I kind of cranked out a letter and I told Paul Vick, I said I'm going to include a clause in here begging this guy not to act before we talk. And he said that would be fine.

Q. Are you finished with your answer?

A. Probably took them a copy of the letter.

Q. Took who a copy of the letter?

[136] A. The FBI. There were phone calls back and forth like –

Q. Between whom?

A. Paul Vick and I about him saying things. You know this guy has drawn some attention in California, some people made a report on him. They are doing a background check on him. He has got evidently the ability to carry this stuff out. He has his house surrounded by explosive-type booby trap things. You know, more along the lines what could he do and I told him from what I had been talking to him about that he had threatened to kill a lot of people and he wasn't specific but he mentioned several different easily made like weapons of mass destruction.

Q. So you sent the letter?

A. Yes.

Q. And did you show the letter to Cindy or to David?

A. No.

Q. Before you sent it?

A. No.

* * *

[142] Q. Other than the letter did you have any other involvement in the Tobiason matter before you talked to Sharon Aldridge on September 9 or 10?

A. I got a letter back, a return.

Q. Do you have the letter?

A. No.

Q. Tobiason wrote you back?

A. Right. That letter to Agent Duke Earl.

Q. Did you attempt to attend a gun show where Tobiason was there in September of '98?

A. Yes.

Q. Was he there?

A. Yes.

Q. But before you went to the gun show did you have a conversation with Sharon Aldridge about going to the gun show?

A. Yes.

Q. Who was Sharon Aldridge?

A. Paralegal. She offices right next to me.

Q. Friend?

A. Friend.

Q. Did you tell her that you were going [143] to the gun show at the request of the FBI?

A. I said I was going to do a favor for the FBI.

Q. Did she tell you you better tell Cindy?

A. Yes.

Q. And you called Cindy?

A. Yes.

Q. And what did you tell Cindy when you called her?

A. I said something along the lines of like, you know, Cindy, I sent a letter to that guy. I got a letter back. The FBI wants to know If I go to that gun show and if Tobiason is there, what his state of mind is. And that would be – would be sort of like the end of my involvement.

* * *

[144] Q. Did you tell Cindy you were violating your agreement with the FBI by talking to her?

A. I don't recall.

Q. At the time you talked to her did you feel like you were violating your agreement with the FBI?

A. I don't know what I felt at that time. It was stressful.

Q. Her notes on Exhibit 6 to Phillips' deposition at the bottom says "He was violating [145] agreement with them by even telling me this."

A. Could be.

Q. You are just saying you don't have a recollection of that?

A. Not specifically now, you know. It's like –

Q. Does reading that refresh you recollection that there was some discussion about your living up to the agreement with the FBI and what affect talking to Cindy would have on that?

A. I don't have a good recollection of that. I'm sorry.

Q. Did you tell Cindy you were going to go to the gun show?

A. I don't know if I told her I'm planning to go, I'm going. I think I told her I'm going.

Q. Well, let's avoid what you think or suppose or assume and concentrate on what you remember. Do you recall telling her you were going to the gun show?

A. Yes.

Q. Had you told her how many times you had met with the FBI during the course of the [146] summer?

A. I don't know. I don't know if she asked me that. I would have told her if she asked.

Q. Sure. With regard to Phillips Exhibit 6 there is a mention on the last page of five, six more times this summer. Is that consistent with how many times you had talked to the FBI?

A. Sure.

* * *

[147] Q. (By Mr. Rupe) We are now back on the record and I want to draw your attention to September 14, 1998 and that meeting that you had with Cindy. Was David there?

A. Yes.

Q. All right. Did David tell you that because you had continued to participate in the FBI investigation you should resign?

A. I remember the exact words we have no choice but to terminate you.

* * *

[150] Q. Did Tobiason know you worked for the Federal Public Defender?

A. Yes.

Q. Did he know you were cooperating with the FBI?

A. No, not that I know of.

Q. Did you volunteer that information to him at any time?

A. No.

* * *

[172] Q. Well, let's take the sentence. Is that a true statement that you, Dan Rupp, advised us, the Federal Public Defender in June, that prior to notifying anyone in this agency, meaning the Federal Public Defender's Office, you Dan Rupp had notified the FBI with information about the activities of a certain individual you believe to be potentially dangerous. Is that a true statement?

A. Yes.

* * *

[175] Q. Did the FBI help you draft the letter to Tobiason?

A. They said write him a letter if you can or please write him a letter. Find out, you [176] know, when he may be back.

* * *

[183] Q. Do you agree with this statement in the complaint that you filed, paragraph 41. "Rupp wrote a single letter to Tobiason in mid June, 1998"?

A. Yes.

Q. Did you request in that letter a catalog of more recent books?

A. Yes.

Q. Did you explain to him there were some positive alternatives to Tobiason's problems with the government?

A. Yes.

Q. When you read Tobiason's response at the end of June, 1998 and he said "I have already decided an effective and quite appropriate solution to both the justice system and government's actions, thanks anyway, will [184] you be at the show eleven thirteen, September"? When you read that did you think there was a possibility you might be a witness?

A. No. It never occurred to me.

Q. So you didn't think the letter was important that you got from Tobiason?

A. Sure, yes.

Q. Sure, you thought it was important or sure, you didn't think it was important?

A. I thought it was important.

Q. In fact, you turned it right over to the FBI?

A. That's true.

* * *

COPY OF TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plaintiff,

vs. Case No. 99-2101-WEA

DAVID J. PHILLIPS, in his personal capacity,

Defendant.

DEPOSITION
OF
CINDY MCNORTON,

taken on behalf of the Plaintiff, pursuant to Notice to Take Deposition, beginning at 10:00 a.m., on the 16th day of July, 1999, at the Capitol Plaza Hotel, 1717 Southwest Topeka Boulevard, in the City of Topeka, County of Shawnee, and State of Kansas, before Susan J. Morris, Certified Shorthand Reporter.

* * *

[33] Q. Okay. When did the issue of Dan's involvement with the FBI first come to your attention?

A. I think it was on the morning of June 9. That would have been a Tuesday.

Q. What happened then?

A. I received a phone call from Sharon Aldridge who is a paralegal in the [34] Wichita office. At that time, I believe her position was as an assistant paralegal, and she –

Q. Has she been promoted since?

A. Yes.

Q. When was that?

MR. RUPE: We've agreed on a protective order about other employees' information and we'll reduce it to writing, but go ahead and answer the question, if you can.

A. I think it was in March of '99.

BY MR. HOLLIS:

Q. Okay. What did Sharon Aldridge tell you when she called you, I guess, on June 9 of 1998?

A. She wanted to know if I knew what was going on with Dan and the FBI and I didn't know what she was talking about and she indicated to me that on the day before, Dan had come into the office and had a meeting with, I think, I don't know if she told me the FBI or some other law enforcement agency, but he ultimately went to meet with the FBI about someone he had [35] met at a gun show or someone he saw at a gun show the weekend before and that he was going to be going back to the gun show the next weekend and wearing a wire and doing some undercover work for them and she told me that she had tried to get Dan to call me. He was telling her about his activities the day before, what he was going to be doing, and that she asked him if he had talked to me about it and he said no, he wasn't going to talk to me, and she said, "Well, then, you need to at least tell David," and he eventually did call David, she said, and she wanted to know if I had heard about it and I said no, I had not.

* * *

[37] Q. Tell me what you recall of the conversation, first conversation you had with David about Dan's involvement with the FBI.

A. It was sometime shortly after I talked with Sharon. I called and asked him if he knew something about Dan being involved with the FBI and he indicated yes, that Dan had called him and hadn't Dan called me, because he had told him that he should call and let me know and I said no, I hadn't heard anything from Dan, just from Sharon, and David said that Dan had told him that he had met this individual at a gun [38] show who was going to make some sort of biological weapon and he had immediately brought it to the attention of the FBI and he told them that that was a good show, or words to that effect, and that Dan had told him that they were, that he was still in the process of providing them with the details, and I asked him if he was aware that Dan was going to be attending this gun show the next weekend and wearing a wire or something and he said no, he didn't know anything about that, that that was not mentioned in his conversation with Dan, and then he asked me to call Dan and find out what the deal was.

Q. So your understanding from when you talked with David was that David's first conversation with Dan, Dan said I've talked to the FBI and David said good for you, talk to Cindy about it, and that was about it?

A. Yes.

* * *

[39] Q. Did David mention any concern about the conflict of interest in the first conversation you had with David?

A. Yes.

Q. What did he say?

A. We talked about what might happen if Dan went to this gun show and worked undercover in that capacity wearing a wire. I didn't have good information about what exactly the plan was. We were just speculating about if that's what he was [40] doing, what kind of problem that would pose for our office if this should be a high profile case and Dan were a witness for the government and that kind of information being publicized and then clients of our office learning that one of our investigators was working for the government and developing a case against someone else.

Q. This is what David said?

A. It was just a conversation that we had. I don't remember who said what part of it. We were just talking about the possibility of what could result from it.

Q. And the concern was if it became a high profile case, that it came out in the papers that one of your investigators was a witness for the government, that was a concern?

A. Yes.

Q. And what was the concern about it coming out in the papers that way?

A. That it would be known. Most of the clients that the Wichita office represents, or a large percentage of the

clients that the Wichita office represents [41] are located in Wichita and there was just concern that they would know that the investigator that they are confiding in, that's working for them, in fact, is working for the other side which is what they always accuse us of doing anyway; that it would just defeat the trust or confidence that those clients have in us.

* * *

[43] A. Well, that David told me to call Dan and find out what exactly he was planning to do since that wasn't something that he had communicated to David.

Q. Okay. Then what did you do?

A. I called Dan and asked him about it.

Q. Okay. Tell me what you recall of that conversation.

A. I remember Dan telling me in some detail, kind of got lost in it, about this person that he had met at the gun show. It wasn't someone he had just met. It was someone that he had known over a couple of years from seeing him at gun shows and they kind of established some dialogue with each other about this manufacturing of biological weapons. They had a common interest, he said, and this guy had some materials that he had purchased from him in the past and when he stopped and visited his booth at [44] this gun show, he thought the guy was targeting someone, that he was angry at someone and was making noise about actually making one of these biological weapons and began telling me about that anthrax is something that's found in nature, and that was where I really got lost because it went right over my

head. It wasn't something I was familiar with. He said that he was concerned about it so first thing Monday morning, he went to see Dennis Laughrey who is an ATF agent. He said Dennis referred him to the FBI and that he ended up meeting with an agent, I believe Paul Vick, and that they had discussed there was another gun show coming up this weekend in Wichita that the guy was planning on attending and that they were discussing some possible scenarios that Dan might be able to do to kind of set this guy up.

Q. Okay.

A. Dan said some of these things were his suggestion such as he had offered to wear a wire and go let them listen to the conversation that he was having with him. [45] He said another possibility that he suggested was that he didn't think that the guy had the money to finance the manufacture of this biological weapon and that Dan had a $50,000 CD that he offered to use. He told the FBI he would take it and show the guy so he would be willing to help him with what he needed to get it done, but he didn't – they hadn't really decided what they were going to do. They just knew they were going to do something that next weekend.

* * *

[48] Q. Then what was the next conversation you had with someone about Dan?

A. Dave. I then called Dave back and indicated to him that Dan had told me his possible involvement was going to be, and Dave's reaction was pretty immediate that, you know, we can't have him work undercover for

the FBI, and that he wanted me to call him back and tell him and he said, "And you tell him that I said that I don't want him having any more involvement with this." I explained to him about the conflict of interest, how this puts our office in a situation of being in conflict with other potential cases, cases that we currently have involving the FBI, the appearance of a conflict because of him possibly being a witness in this case, and let him know that he's not to have anything further to do with it, and I expressed to Dave that I was [49] concerned that Dan wouldn't be amenable to that because when he was describing these events to me, he was pretty eager to do it and he said, well, let him know then that he can do that, but not continue his employment here, so he has an option if he wants to continue to work on this matter with the FBI, then he cannot continue his employment.

* * *

[56] A. I remember I called him back and said that I had talked with Dave and that Dave was concerned and wanted him to understand that this posed a real conflict of interest situation for the office. He was concerned about it because Dan hadn't told him about it and that that left him without the ability to be aware of a potential conflict for the office and to describe to him what we had talked about how that would undermine the confidence of the clients in the agency and I told him that [57] and I told him that he was not to have any more involvement in this investigation, that the FBI had people who are very capable of taking it from there, and that Dave wanted him to let them do their job and to not have anything further to do with it, and that if he, that we knew that he felt very strongly about it and if he wanted to continue

his involvement in that investigation that he would not be able to continue his employment with our agency.

* * *

[61] A. I don't recall if he called me or I called him, but at some point fairly early the next day, we talked and he said that he had thought it over and that he, he said, "I need my job and I know they don't need me to do this, but I really, really want to do it, but I know that I can't," so he said he wasn't going to have any more to do with it and he would let Paul Vick know that.

Q. Okay.

A. And I could tell that he did really, really want to do it so I expressed to him that if he had any change of heart about it that he needed to let me know immediately.

* * *

[62] A. I got a call from Dan sometime that same day.

Q. Which day?

A. Wednesday, the 10th. It was the day that he had called me back and said, "I want to keep my job; I won't have any more to do with this." He called me later on that day sometime and said that he had talked to Paul Vick and that they wanted to know just what he could do, you know. He wanted to find out what his parameters were, what would be over the line. He wanted to be able to go right up to the line and I told him that he was out of it, that there was nothing more that he could do on that case, that was the parameter, and to recall, [63] you know, what our instructions were to him, that if he did, he

wouldn't be able to still work there and he said okay, he understood, but he told me, "I did promise them that if I had heard from the guy I would let them know," and I said, "No. If you hear from him, you need to let me know and then we'll give you instruction on how to proceed."

* * *

[74] A. I called, returned Dan's call and told him I was sorry I was just getting back to him but that I'd been in this meeting on the Glover case, which he was well aware of of what those were like, and he apologized for bothering me, but that Sharon had told him he needed to call and let me know that there had been some developments in this situation that we had before and I said, "Okay. What are they?" And he indicated to me that there was a gun show coming up that weekend that he was planning, that he was going to and that he was going to meet with this guy, it was going to be under the direction of the FBI, that he was to talk with this person and then he was to page Paul Vick who would be there somewhere and they would get together and decide what to do further, and I said, "How did this all come about?" And he said, "Well, I wrote a letter. They asked me to write him and I did," and I said, "When did this happen?" And he said, "Almost immediately after the [75] situation in June," and I said, "Would you fax me a copy of that letter?" And he said, "I don't have it." I think he indicated he had given a copy of it to the FBI.

Q. Did he say what was in the letter?

A. He wanted – I think he described that they were just wanting to know generally what the guy was up to, if he was still intending to do anything, and I think he

added that he was trying to convince the guy not to do anything.

Q. You mean not to do any mass weapon attacks?

A. Not to make the biological weapon that he had described, and then he said as things got closer that the guy wrote him back and that he was surprised, and so as soon as he got the letter back from the guy, he gave it to Paul Vick and the letter indicated that he was intending to be at this gun show in Wichita that weekend in September and he said as that event approached, things kind of heated up and they had several meetings and I asked him when did this –

[76] Q. Go ahead.

A. Oh, and I also asked him if I could have a copy of the letter the guy sent to him and he said –

Q. Did he indicate what was in the letter?

A. Just that the guy had indicated that he was going to be at that gun show. He may have said that. I don't think he did describe what was in the letter at that time, but they were interested in him meeting with this guy again to see if he was still intending to do anything, and I asked him when did this all start up again and he said about midway between now and the last time, and I asked him how many times, how many meetings have they been having with him and he said probably five or six, and he told me that he had been discussing various levels of protection with them, like different levels of informant protection, maybe even the witness protection program and they said that wouldn't be necessary, that they had read to him the Code Information, I don't know

what that means [77] and I didn't ask him what that meant, and he told me when he made that statement, he said, "As a matter of fact, I am violating that agreement by even telling you this."

Q. What agreement?

A. I don't know what agreement, but he said it at the same time as he was telling me that they had read him the Code Information.

Q. In other words, that the FBI didn't want Dan to tell anyone about his involvement?

A. He said that they had read him the Code Information and that he was violating that agreement and I thought well, he must mean whatever that code was by even telling me about it. Either that or I assume maybe the FBI told him not to be telling us, but that was his statement.

Q. So your understanding was that Dan understood that the FBI didn't want Dan to tell anyone about his involvement?

A. He said "You."

Q. His employer, you?

A. Right, and that's the way I took

* * *

[82] Q. Did you consider whether to tell him, whether to tell Dan he should not go?

A. No. It was irrelevant to me. The part of what he told me that I was concerned about was immediately, he told me that immediately after he'd been instructed not to

do this that he did it and that he continued to do it throughout the summer and then in September brought it to my attention only because Sharon told him he should.

Q. Okay. What was your next conversation with anyone about this [83] situation?

A. It was the next morning, that Friday morning.

Q. With whom?

A. Charles and David.

Q. What do you recall was said in that conversation?

A. We had a telephone conference. I think Charles and I were in Topeka and David was in Kansas City and David wanted to know what was going on and what had happened with Dan and I told him about the conversation I had with Dan and he was unhappy.

Q. What did David say?

A. I don't remember exactly what he said.

Q. Approximately?

A. Immediately in response to my telling him?

Q. What was the gist of what he said?

A. Disbelief, just questioning, you know, why is he doing this, what do we do about it? And I think he sought Charles' and I's position about what should be done.

Q. And you said?

[84] A. I told him at that point I didn't know what else I could do to correct the behavior that I felt like we

implemented back in June, the only corrective behavior that was available, and the only correction that was available was to tell him to discontinue and if there's more involvement to let us know immediately before he did anything. He disregarded that and unless someone had some idea of what else could be done, I didn't see that we had any other option but to terminate him.

Q. Was there any discussion of telling him not to go to the meeting that weekend?

A. No.

Q. The gun show?

A. No.

Q. What else was discussed in that conversation?

A. I think David sought the same position from Charles, asked him what his position was about it and Charles agreed and expressed – I don't know if Charles or David, someone expressed, one of the two, [85] that he just continued by doing this to put us in a position of a potential conflict that we didn't know about and that was a problem for David as head of the agency.

Q. What was the conflict that Charles expressed?

A. I don't know if there was any detailed explanation about what the conflict was. I just, I knew what the conversations were back in June about what the potential conflicts were and I don't think there was any more discussion about what kind of conflict it put us in. We had all those conversations.

Q. So you weren't concerned with Dan going to the gun show that weekend because you thought what he already done was enough to fire him over?

A. Absolutely.

Q. Writing the letter to Tobiason?

A. Meeting five or six times with the FBI, planning the activities of him acting in an undercover capacity.

Q. And writing the letter to Tobiason? That being the first thing that [86] was done, was that enough to fire him over?

A. I don't know if that would have been or not. If he had immediately brought it to our attention, I don't know. That would be speculating. That's not what happened.

Q. Anything else you recall from the conversation on Friday where you talked with Charles and David initially about Dan Rupp's involvement with the FBI?

A. I remember that Dave said that he agreed with the way we felt, that he didn't think he could trust Dan; that no matter what he told Dan, he didn't feel he could trust him to carry it out and he was ready to go to Wichita that afternoon and seek his resignation or terminate him.

* * *

[88] A. At some point Monday morning.

Q. Let me guess. You heard from Sharon?

A. No, I didn't. I think she was too afraid to call me. No, I didn't hear from Sharon. I heard from David or Charles and we – I think David led the conversation and

just asked us if anyone felt differently than the way we left in on Friday and I said No, I didn't, and Charles said he didn't and Dave didn't and so then we just worked out how we were going to go and how we were going to handle that. He conferred with Becky about what he needed to do administratively.

Q. Anything else you recall from that conversation?

A. Just when we were going to meet.

Q. Anything else?

A. No.

Q. What was the next conversation you had with anyone about Dan's situation on Monday?

A. Probably in the car on the way down to Wichita.

[89] Q. You rode with –

A. Charles and I rode together to Emporia and we met Dave Phillips at the Turnpike entrance, I think. We grabbed a sandwich and continued to Wichita. We didn't really have any conversation about what had occurred. It was mainly what do we do when we get there; who's going to lead the conversation.

* * *

[110] Q. Now, as part of Mr. Rupp's job for the Federal Public Defender, does he investigate crimes?

A. He doesn't investigate crimes in the way that the law enforcement agencies do.

Q. He investigates the allegations of crimes against the clients of the Federal Public Defenders?

A. Right.

MR. HOLLIS: Objection. Leading.

BY MR. RUPE:

Q. Well, explain what the Federal [111] Public Defender investigators do.

A. Well, we do a lot of things, because with regard to the investigation of allegations, we review the reports that are generated by the law enforcement agency that investigated the case and we look for mistakes that they made and try to exploit those mistakes to the benefit of our client.

Q. And is the goal in that investigation and the defense of somebody charged with a federal crime to create reasonable doubt?

A. Absolutely.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUFF,

Plaintiff,

vs. Case No. 99-2101-WEA

DAVID J. PHILLIPS, in his personal capacity,

Defendant.

VIDEOTAPED DEPOSITION OF PAUL W. VICK, a witness, taken on behalf of the Plaintiff, pursuant to Subpoena, on the 16th day of August, 1999, at the United States Department of Justice, District of Kansas, 500 State Avenue, Suite 360, Kansas City, Kansas, before

MYLES A. MEGEE,

for AAA Reporting Company, a Registered Professional Reporter, Certified in Kansas and Missouri.

APPEARANCES

For the Plaintiff:
MR. LEE J. HOLLIS
THE HOLLIS LAW FIRM, PA
5100 West 95th Street, 2nd Floor
Prairie Village, Kansas 66207

For the Defendant:
MR. DWIGHT DAVID FISCHER
HUSCH & EPPENBERGER, LLC
301 North Main, Suite 250
Wichita, Kansas 67202

* * *

[11] A. I appreciated getting the information. I didn't have really any feelings other than documenting the information that he gave me and I was appreciative of the information that he gave. With me also knowing the kind of job that he had with the federal defender's office, we did not want to put him at risk with regard to his job. We did discuss options on how he could be of further help to us. I do believe we discussed the option of being a cooperating witness where – that's a term that we use where a person can be used to testify later. That person may volunteer to be wired up and discuss things with a person that we have an interest in. And that would then necessitate the person eventually having to testify. Dan, if I [12] remember right, told me on the day that he provided the information to us that he did tell his boss or bosses about the fact that he was coming to our office with this information, and at the time I don't believe that his office had a concern with regards to him initially disseminating this information to us, but they did ask him not to become further involved with regards to having to testify because it would be a conflict of interest. So we – our office honored that request. We have a lot of people that provide information to us in the private and business sector, and we open people up as a confidential source to document information such as Dan provided us and we had the intention of using additional information that he would provide to us on a confidential basis and it would be written up in such a way that he would not be identified and that he would not have to testify in court.

* * *

[30] Q. (By Mr. Hollis) is it a federal crime to develop and threaten the use of weapons of mass destruction?

A. It's a federal crime to generate biological agents and then use them to threaten or kill or harm people. It has to be a combination of [31] both. If a person just develops a virus or something that's harmful, if it's not coupled with a threat or an actual act or an attempt – you know, some kind of a threat or an action, it's not against the law.

* * *

[34] Q. With a confidential source such as Mr. Rupp – well, let's just talk about Mr. Rupp specifically. You directed him to keep the information that you shared between the two of you confidential; correct?

A. Yes.

Q. From whom was he supposed to keep that confidential?

A. I asked him to keep it confidential from anybody.

Q. Including his employer?

[35] A. I didn't specifically say who he should not talk about, but I just told him that if he was going to provide us information, it would be best – we tell all of our sources to keep it confidential from everyone that they're providing information to us.

Q. And everyone would include his employer; correct?

A. Yes.

* * *

[39] Q. You previously discussed the fact that you had met Mr. Rupp at some criminal trials or a criminal trial; is that correct?

[40] A. Yes.

Q. What was your role in that trial?

A. I was the case agent.

Q. Meaning that you investigated the individual that was on trial?

A. Yes, individuals.

Q. And for whom were those investigations conducted?

A. What do you mean, for whom?

Q. They were on behalf of the U.S. attorney?

A. Yes.

Q. And you're aware that Mr. Rupp is an investigator; correct?

A. Yes.

Q. Are you aware of who he investigated for?

A. Yes.

Q. And who did he do investigations for?

A. Are you talking specifically on this one trial or –

Q. As an employment – during the time you had this relationship with him or this contact with him.

A. For the federal – federal public defenders.

Q. Are you familiar with what the role of the federal public defender is?

A. Yes.

[41] Q. What is it, in your understanding?

A. They provide legal assistance to defendants that are charged that can't otherwise afford a private attorney.

Q. And these are individuals oftentimes who the FBI has investigated on behalf of the U.S. attorney?

A. Yes.

Q. And the U.S. attorney is prosecuting these individuals; correct?

A. Yes.

Q. And the federal public defender is charged with defending the individuals; correct?

A. Yes.

Q. Sc oftentimes or generally you're on opposing sides from the federal –

A. Yes.

Q. – public defender; correct?

A. Yes.

* * *

[45] Q. Do you feel the FBI was capable of investigating Mr. Tobiason without the assistance of Mr. Rupp?

MS. KARLIN: Objection. It's outside the scope, instruct him not to testify.

A. Prefer not to answer that.

Q. (By Mr. Fischer) The FBI is a government agency; correct?

A. Yes.

Q. And you have offices throughout the United States; correct?

A. Yes.

Q. Approximately how many full-time employees does the FBI have? Do you know?

A. 27,000, I think.

Q. And offices throughout the United States?

A. Around the world, yes.

Q. Around the world. Do you have any idea what the FBI's annual budget is?

A. I would not want to make a guess, but it's in [46] the billions.

* * *

[50] A. My boss attempted to sit down with Mr. Phillips and explain the difference if he had a question as the difference between a cooperating witness and a confidential sourse [sic], and it's my understanding that Mr. Phillips declined to meet with my boss on that matter.

Q. Are you aware that that proposed meeting [51] occurred approximately 3½ months after your contact with Mr. Rupp initiated?

MR. HOLLIS: Go ahead.

A. Yes.

Q. (By Mr. Fischer) So at no time in the intervening time between June 8th and September 23rd did anyone from your office attempt to explain that to the federal public defender; is that correct?

A. No, because we didn't have a need to do that.

Q. From the FBI's perspective, you had no need to do that; correct?

A. Yes.

Q. So based on your involvement with Mr. Rupp in this investigation – let me strike that. Based on the arrangement that you made with Mr. Rupp at the beginning of his involvement with this investigation, you were proceeding under the assumption that you would be able to continue with any investigation and potential prosecution of Mr. Tobiason without the assistance of Mr. Rupp?

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plaintiff,

vs. Case No. 99-2101-WEA

DAVID J. PHILLIPS,
in his personal capacity,

Defendant.

VIDEOTAPED DEPOSITION OF WILLIAM R. SECK, a witness, taken on behalf of the Plaintiff, pursuant to Subpoena, on the 16th day of August, 1999, at the United States Department of Justice, District of Kansas, 500 State Avenue, Suite 360, Kansas City, Kansas, before

MYLES A. MEGEE,

for AAA Reporting Company, a Registered Professional Reporter, Certified in Kansas and Missouri.

APPEARANCES

For the Plaintiff:
MR. LEE J. HOLLIS
THE HOLLIS LAW FIRM, PA
5100 West 95th Street, 2nd Floor
Prairie Village, Kansas 66207

For the Defendant:
MR. DWIGHT DAVID FISCHER
HUSCH & EPPENBERGER, LLC
301 North Main, Suite 250
Wichita, Kansas 67202

* * *

[8]Q. What – I don't know exactly how to word this. What is the purpose of the FBI or does the FBI have a mission statement or something of that sort like a lot of organizations do?

A. Well, gosh, I don't know about a mission statement. I mean, primarily we're hired to do two things and that's to collect facts and evidence, and we do those on a very broad spectrum of investigations that are dictated by laws that are on the books and we enforce those. We take those facts and evidence to the United States Attorney's office for prosecutive opinion in most cases and that's what – that's what our mission is.

Q. Okay. And so the FBI is a government agency; [9] correct?

A. That is correct.

Q. And as a government agency, your purpose is to serve as law enforcement; correct?

A. That's correct.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plaintiff,

vs. No. 99 2101 GTW

DAVID J. PHILLIPS,
in his personal capacity,

Defendant.

VIDEOTAPED DEPOSITION OF DAVID J. PHILLIPS, the Defendant, taken on behalf of the Plaintiff, pursuant to Notice on the 14th day of June, 1999, at the law offices of HUSCH & EPPENBERGER, LLC, 7111 W. 98th Terrace, Overland Park, Kansas, before:

CAROL HAGGERTY

of AAA Reporting Company, a Notary Public of the State of Kansas.

APPEARANCES

For the Plaintiff:
MR. LEE J. HOLLIS
THE HOLLIS LAW FIRM, PA
5100 West 95th Street, 2nd Floor
Prairie Village, Kansas 66207

For the Defendant:
MR. ALAN L. RUPE
HUSCH & EPPENBERGER, LLC
301 N. Main, Suite 250
Wichita, Kansas 67202

Also Present:
Ms. Stacia Gressel
Mr. K. David Rupp

* * *

[7] Q. When did you first hear that Dan Rupp was talking to the FBI?

A. It was in June of 1998, I believe.

Q. What did you hear?

[8] A. I heard that he had met an individual at a gun show, that Dan felt that individual possibly could be dangerous, that Dan decided to discuss the matter with the FBI. I also heard that either Dan or the FBI had suggested that he wear a tape recorder to tape this individual at a gun show. And that's the essence of what I heard.

Q. From whom did you hear this?

A. I believe I first heard it from Cindy McNorton.

* * *

[10] Q. What did you tell Ms. McNorton after she told you that she had been approached by Dan Rupp and they had discussed this person with whom he had been talking at the gun show?

A. As I recall, I told Ms. McNorton that she should commend Dan for having initially told the FBI that there was a dangerous character at a gun show that he had met. I told her that I felt that his continued investigation of this matter should not continue. Because of the fact that we represent criminal defendants, I believed that there was, in fact, a conflict of interest by assisting the FBI in

what I considered to be an undercover capacity. And I asked her to tell him not to do it. I believed that the FBI had professionals who could investigate matters much better than Dan.

Q. Why did you commend Dan for having initially told the FBI about the gun show?

A. I felt it is proper when someone learns of someone who is talking of possibly committing a [11] crime that they alert the authorities to that individual.

* * *

[13] A. She told him that I had told her that I felt his continuing in the investigation would be a conflict of interest and that he should not do so, and that if he wanted to do so that his job would be in jeopardy. She told me that Mr. Rupp thought about it overnight and then called her back and said that he wanted his job, that he believed that there were other people that could do the job for the FBI, and that he would not participate any further in the activities with the FBI in this investigation.

* * *

[20] Q. After June of '98 when did you first hear about the issue of Dan and the FBI?

A. It was either the 9th or 10th of September.

Q. What did you hear then?

A. I heard that soon after Dan promised not to be [21] involved any further with the investigation of this individual that the FBI had contacted Dan and wanted his further involvement, that Dan felt if they asked him to do that, he needed to do so, that he wrote the individual a

letter at the direction of the FBI, that there was correspondence over the summer between Dan and this individual, that Dan met with the FBI approximately six to seven times during that summer concerning this matter, and that Dan planned to attend a gun show, I believe it was September 11, where the FBI wanted Dan to have a conversation with this individual again.

Q. From who did you hear that?

A. Cindy McNorton.

Q. When did you hear that?

A. It was either the 9th or 10th of September.

* * *

[23] Q. What were the opinions, if any, voiced by anyone else with whom you spoke about the issue of terminating Mr. Rupp?

A. Everybody I talked to believed that it was a flagrant violation of what Dan had been instructed to do by us. He had told us that he wasn't going to be involved further. But I found out later that he had been involved and was continuing his involvement throughout the summer. That, in effect, breached any kind of trust I could have with Dan as far as believing anything he said. I believe it developed a conflict in the office with respect to what we do in representing our clients.

Q. With whom did you speak, then, in terms of consulting with others about the termination of Mr. Rupp?

A. Other than those people that I just mentioned, Dedmon, Cindy McNorton, and Becky Willis, I don't believe that I conversed with anybody.

* * *

[27] Q. That Friday when Cindy told you that Dan was going to another gun show that weekend, or was talking about going to another gun show, was there any discussion of whether Dan should be told not to go to the gun show?

A. I don't recall any discussion that someone should tell him not to go. It was my feeling at that time he had been told already he could no longer be involved in that investigation and that he shouldn't do it. There wasn't any reason to have any additional information.

Q. Well, he had contacted Cindy McNorton to advise her that he was considering going to the gun show that weekend. That's what you were told. Right?

A. I was told that he had a discussion with Sharon Alderich that his birthday was coming up, that he was going to a gun show, that he was going to be contacting this individual again, and that she, in essence, told him he better contact us and let us know what he was going to be doing.

Q. And he did, right?

A. And he did after he talked with her and she told him he better call us.

Q. And he called Cindy that Friday morning. Right?

[28] A. Sometime on Friday.

Q. And that is my question, was there any consideration of advising him whether or not you wanted him to go to the gun show or didn't want him to go?

A. I don't believe we had the discussion of whether we wanted him to or not. I mean it was decided a long time ago that we didn't want him to be involved.

Q. Then why didn't someone get back to him and tell him that?

A. It's my understanding that Cindy was involved in several other matters with our office at that time, and that if she didn't get back with him that is why she didn't get back with him. It wasn't because she thought it was not an important matter.

Q. What was she involved in, as far as you knew at that time?

A. I'm not certain. Cindy is in our other branch office in Topeka, Kansas, and so I'm not aware of the day-to-day cases that she's working on.

Q. Well, from your perspective as you mulled the decision over that weekend did it make a difference to you whether or not he went to the [29] gun show or were you more concerned about what he had already done?

A. As I mulled it over, it really made no difference whether he went to the gun show or not.

Q. Why not?

A. Because I felt he had violated my trust, as I indicated. He had done exactly what he said he would not do. I felt that continuing involvement continued to

create a conflict of interest for our office in representing defendants who are charged with crimes.

* * *

[34] Q. You were concerned that if Mr. Rupp's cooperation with the FBI came to the attention of one of your potential clients, or actual clients, that they would be concerned that you would not be what?

A. That we would not be interested in defending them to the best of our abilities if one of our investigators was actually investigating or assisting in the investigation with the FBI.

Q. And what would have been the harm, just for purposes of argument, if they did feel that way?

A. Well, we have an obligation to defend them to the best of our abilities, and if they feel that we can't – you have to understand that many times clients feel that we may be an arm of the [35] government; in other word, the prosecution. And we battle that battle all the time. If we have one of our own people who is assisting the FBI, it would be vastly detrimental to the representation of that client, if that client learns of it.

* * *

[42] Q. (By Mr. Hollis) Okay. You have been given copies of Exhibit 1 and 4 which are letters purported to have been written by you. Is this what they are?

A. Yes.

Q. They discuss reasons why you decided to terminate Dan Rupp. Correct?

A. That's correct.

Q. Do those letters, Exhibits 1 and 4, present an accurate description of why you decided to terminate Mr. Rupp?

A. I believe so.

Q. Is there anything other than what is in Exhibits 1 and 4 as far as the reasons why you decided to terminate Mr. Rupp that are not discussed in Exhibits 1 and 4?

A. Well, with respect to Deposition Exhibit 1 on [43] the second page –

Q. That's a letter dated September 18?

A. Yes, where we're talking about not observing high standards of conduct so that the integrity and independence of the office are preserved and so that the defendant office reflects the devotion to serving the public defender's clients and the principle of equal justice under the law. Dan's actions were disruptive with respect to our office. As I indicated before, we have dedicated people who are interested in representing clients who are charged with crimes. They have devoted their entire professional lives, many of them, to doing exactly that.

And Dan's actions are directly contrary by his continuing involvement in this investigation, or directly contrary to the mission of our office. And I think it was disruptive not only in case clients learned of his behavior, but it's also disruptive – for instance, Sharon Alderich knew of it, Cindy knew of it, Dedmon knew of it. I think it was disruptive to all of us. But other than that, I believe Exhibits 1 and 4 do include the reasons [44] he was fired.

Q. Exhibit 1 does not include the reference that Mr. Rupp's behavior could disrupt the personnel of the office as opposed to clients, and that's what you were saying should have been included?

MR. RUPE: Objection; argumentative, mischaracterization.

A. I believe it is included under No. 1. I was explaining what that, in effect, means. It's basically setting out the mission of our office; and when people do things that are inconsistent with our mission, I feel that they disrupt the running of our office.

Q. (By Mr. Hollis) Was there anything else in Exhibits 1 and 4 that you considered as far as the reasons why you terminated Mr. Rupp, other than what is in Exhibits 1 and 4?

A. Other than what we already commented on and what is in Exhibits 1 and 4, I don't know of any.

Q. Well, I'd like to go over everything, all of the reasons why you decided to terminate Mr. Rupp. And if there is anything other than what is in Exhibits 1 and 4 can you please tell us then?

A. He was terminated because he continued investigating a case for the FBI when he was [45] told he should not do that. He told me or Cindy, one of the two of us, that he would not do that. He agreed with us that other people could do the very investigation that he continued. By doing that he breached any kind of trust that I had in him. There was no way in the future that I would be able to believe anything he said.

Q. That is in the letter, those facts are in the letter. Right?

MR. RUPE: Counsel, you have asked him to explain. He is explaining. Don't interrupt his answer.

MR. HOLLIS: I have not asked him to explain all of the reasons why he decided to terminate Mr. Rupp. I asked him to explain any reasons which are not included in the letters, Exhibits 1 and 4.

A. I believe that the reasons for his firing are included in the letters.

Q. (By Mr. Hollis) Any other reasons that are not included in the letters?

A. Not that I know of.

Q. Now, was there any disruption of the personnel in the office as a result of Mr. Rupp's [46] cooperation with the FBI?

A. Well, it depends on how you define disruption. With respect to people understanding and believing in what our office does, there was disruption when he continued his investigation and it was later learned that he had continued investigating a case for the FBI.

Q. On what facts do you base that statement?

A. On the fact that the parties involved that I just mentioned, Sharon Alderich, Dedmon, Cindy McNorton, Becky Willis, all of us were aware of what he had done. There may be other people within the office that also were aware of what he had done. As I indicated, the people with whom I discussed this matter, there was

never anyone who failed to see that there was a conflict in what he was doing, and a conflict with respect to the mission of our office, which is basically focused on the representation of our clients.

Q. In what ways did a conflict within the office based on Mr. Rupp's activity manifest itself?

A. The people in the office – I know that he discussed this matter with Sharon. Sharon was disturbed enough to tell Mr. Rupp that if he did [47] not inform us, that she was going to do so. So obviously, her activity was disrupted. It's my understanding that Dan talked to the FBI on at least one occasion in our office. The morning he was fired it's my understanding he took materials that he purchased at the gun show to the FBI office during working hours.

Q. Was that a reason that you fired him?

A. No. But that is the type of activity that is disruptive to the office.

Q. Have you finished your answer about what facts you base the conclusion that there was disruption in the office? You told us about Sharon Alderich feeling that she had to report the issue. Any other facts on which you base the conclusion that there was disruption?

A. I mentioned all of the people that I had discussed it with within the office. Obviously it disrupted their being able to perform other duties, worried about what Dan was doing.

Q. On what do you base that statement?

A. Because I know Cindy spent time discussing that matter with me and with Charles. I discussed it with both of them.

* * *

[48] Q. Was Mr. Rupp asked to sign a letter of resignation?

A. He was given the choice of either signing a letter of resignation or being fired.

* * *

[50] Q. After you arrived in Wichita the Monday afternoon when you terminated Mr. Rupp, what transpired then?

A. I have an office at the far end of that office complex, and as I recall we went into that office and then one of us asked Mr. Rupp to come into the office.

Q. Before that happened had you had any discussions with anyone about Mr. Rupp's activities?

A. I don't recall talking to other employees. Someone in my office may have called and asked that – well, just notifying them what was going on.

Q. So at that point you didn't even know whether Mr. Rupp had been to the gun show that weekend?

A. That's correct.

Q. Did it matter to you?

A. No.

[51] Q. Why not?

A. Because I felt that he had breached my trust. He had told me absolutely that he was not going to do that anymore – have any more involvement. He told me that other people with the FBI could do the investigation and that they did not need him to do that, and he immediately after that was in contact with the FBI again. They asked him to write a letter, as I understand it. He did that. He had five or six meetings throughout the summer of which I was not aware, that he did not tell us about. There was no way I could trust the individual any more, and I felt he needed to be terminated, in addition to the other reasons that I mentioned.

Q. You called Mr. Rupp into the office, and tell me what you recall of that meeting.

A. As I recall, Dan came in and I said something to the effect that I assume you know why you are here. Dan commented that he did know why he was there. He was apologetic and said he was sorry. I told him he had placed me in a situation that I had nothing that I felt I could do other than terminate him under the circumstances.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP, Plaintiff,	)	
vs.	)	Case No. 99 2101 GTV
DAVID J. PHILLIPS, in his personal capacity, Defendant.	)	

Deposition of CYDNEY GILMAN, taken by the Plaintiff, K. Daniel Rupp, before me, Janelle E. Goddard, a Certified Shorthand Reporter within and for the State of Kansas, at 301 North Main, Suite 1400, Wichita, Sedgwick County, Kansas, commencing at 11:20 a.m. on the 10th day of August, 1999.

* * *

[11] Q. When did his involvement with the FBI with respect to Tobiason first come to your attention?

A. June the 9th of 1998.

Q. How did it come to your attention?

A. He came to my office, and my recollection of some of the details of what he told me is not excellent, but I would say it revolved around him saying that there was a man at a gun show that he believed could be making I believe it was explosives but I'm not even sure. Some kind of unlawful device that could be dangerous and wanting to work with the FBI in setting this guy up.

I immediately told him that although I couldn't speak for other people at the office, I thought that that was a

horrible conflict of interest for him to be doing – actively setting someone up for what would be a federal charge. It was the FBI who was a federal organization that we work against every day with our clients, and I told him that if our client community knew that one of [12] our employees of our office was actively working with the FBI, one of our adversaries, to set up our – to set up a potential defendant in a federal criminal case, that would destroy any credibility that we would have with our client community.

I also told him that I thought if he did he would very likely lose his job and that I didn't want him to lose his job, that we all liked him and cared about him. I also told him after my years of experience in working with law enforcement agencies and their work with people that help set up people that he was by far not the only person that could accomplish that task. I told him, Dan, the FBI is one of the most powerful federal agencies in law enforcement that there is. They can pull upon resources you can't believe to get other people that can do this to set somebody up but it shouldn't be you. I told him he needed to call Cindy McNorton about this. I thought it was such a serious issue of conflict that I called Cindy myself to make sure that he had called her. I also called David Phillips that day. And I do have my [13] time sheets to reflect that this is the day this happened and the people I talked to.

* * *

[31] Q. Did you ever tell anyone you wouldn't be able to trust Dan after this?

A. Yes. I – you know, after Dan was terminated, there was going to be another hearing, some kind of administrative hearing with the higher-ups of our office, and I remember expressing that what he did was so – and what he had proposed to do when I talked to him was so against what our office does and could have created such distrust for our whole office – if our client community would have learned about that, it would have been all over, and I remember thinking if for some reason they let [32] him back, I don't know how I'm going to do my job because I'm not going to be using him as an investigator.

Q. Why not?

A. Because I couldn't trust him to know that he knows the difference between what is defending a person who is charged with a crime and what is going and setting somebody up for a crime. It so put my trust in his judgment in a deteriorated state that I thought I'm not going to be able to have an investigator unless they hire somebody else.

* * *

Office of the
FEDERAL PUBLIC DEFENDER
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DAVID J. PHILLIPS
Federal Public Defender

CHARLES D. DEDMON
First Assistant Federal Public Defender

September 18, 1998

Dan Rupp
999 N. Silversprings Blvd., #416
Wichita, KS 67212

Dear Dan:

During our meeting on September 14, 1998, you tendered your resignation from your employment with this agency effective September 25, 1998. This letter is to memorialize the reason your resignation was requested.

As indicated during the meeting, you were counseled in June, 1998, concerning your activities with the FBI in investigating an individual. You advised us in June that prior to notifying anyone in this agency, you had provided the FBI with information about the activities of a certain individual you believed to be potentially dangerous. With the knowledge and assistance of the FBI you had agreed to wear a "wire", and meet with the individual at a gun show. In our discussions with you at that time, you were commended for bringing the individual to the attention of the authorities. You were told you could

not continue active "undercover" participation in the investigation of the suspect, because such activity would create a conflict of interest with respect to your ability to perform your investigative duties for the office, and also create a real or apparent conflict for the office in representing those accused of doing similar things. You were given the choice of resigning at that time, if you chose to continue your undercover work with the FBI. If you wanted to remain with our agency, you were told to cease all activity related to that investigation. After careful thought you chose to continue your employment with this agency. You agreed to follow my direct instructions to cease further activity with the FBI. You were counseled that in the future, if you came into possession of additional information concerning that investigation, you were to report it to your supervisor, Cindy McNorton. She was instructed to consult me, and as the head of this agency I would advise how to proceed.

On September 10, 1998, at the insistence of a fellow employee in whom you had confided, you advised Ms. McNorton that you had, immediately following our discussions in June, resumed your cooperation with the FBI in investigating the matter you previously reported to them. You said that these activities included writing a letter to the individual at their direction, and participating in 5 or 6 meetings with the FBI over the summer. These meetings were to culminate in a planned contact by you with the suspect at a gun show on the weekend of September 12-13, 1998. None of the aforementioned activities were discussed with me or your direct supervisor prior to your renewed involvement. You specifically had

agreed to have no further involvement with the investigation.

Your action constitutes a breach of trust, and has created an atmosphere wherein you can no longer be trusted to do what you are told, or to keep sensitive information confidential. As discussed with you, the position of investigator requires a high degree of trust due to the confidential and sensitive nature of the information an investigator must possess to carry out the functions of that position. Equally as important, your actions have violated our code of conduct for federal public defender employees by:

1. Not personally observing high standards of conduct so that the integrity and independence of the office are preserved and so that the defender office reflects a devotion to serving the public defender's clients and the principle of equal justice under law. See Canon 1;

2. Engaging in activities that would put into question the propriety of your conduct in carrying out the duties of the office. See Canon 2;

3. Not respecting and complying with the canons, by not reporting to your supervising authority any attempt to induce you to violate the canons, and by not being faithful to professional standards and maintaining competence in your profession. See Canon 3 A and B;

4. Not avoiding conflicts of interest, and by not advising me of your renewed involvement in the FBI investigation when you knew that such could constitute a conflict of interest in the performance of your duties. You should have

observed the restrictions on your activities imposed by me in this regard. See canon 3F.

All employees are to avoid and report at the earliest opportunity any conduct that may undermine the integrity of this agency to the clients we represent. The look of impropriety, i.e. your working as an undercover operative for one of the agencies that routinely investigates the clients that we represent, undermines our integrity with those very clients. You advised Cindy that the FBI told you not to discuss with us your activities on their behalf. In fact, you advised that the FBI told you that discussions with Cindy or others violated some "code" which governs their investigations. On at least one occasion an FBI agent met with you during office hours at our office to discuss the investigation of the individual. On another occasion, the morning of our meeting with you on September 14, 1998, you left our office during office hours to take items purchased or obtained from the suspect over the weekend to the FBI. We do not know if you spent additional office time on this matter. Assisting the FBI in the investigation on office time was unprofessional and improper.

I am satisfied that you made a conscious decision to continue this undercover work with the FBI. This is supported by the explanation you gave me during the course of our meeting. You told me that you recognized, based on our previous discussions, that you were not to engage in this activity, but you felt that if requested by the FBI (an agency that is not your employer) that you were obligated to give your assistance. Your decision could not be a more flagrant violation of your previous statement

that you would not be further involved in the investigation, and left me, in my opinion, no alternative but to ask for your resignation. I regret that your choice was to continue your work with the FBI in spite of my directive to you to terminate that activity. Your actions, as discussed, constitute a breach of trust, and have created a real or apparent conflict of interest for our agency.

This letter constitutes written notice of the reasons for the adverse action taken in your case, in compliance with the termination and grievance procedures of our office.

Sincerely yours,

/s/ David J. Phillips
DAVID J. PHILLIPS
FEDERAL PUBLIC DEFENDER
For the District of Kansas

Office of the
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DAVID J. PHILLIPS
Federal Public Defender

CHARLES D. DEDMON
First Assistant Federal Public Defender

October 2, 1998

Mr. Richard Ney, Attorney At Law
2225 N. Market, Suite 100
Wichita, KS 67202

Re: K. Daniel Rupp

Dear Mr. Ney:

This letter constitutes my written decision regarding Mr. Rupp's adverse action hearing. In summary, and as will be detailed below, I must regretfully inform you that my decision is to confirm the adverse action previously taken, which will make Mr. Rupp's termination of employment final.

Two general reasons were provided in my September 18, 1998 letter to Dan. First, there was the conflict of interest question and second, there was the breach of trust and failure to follow agreed instructions with reference to my perception of the conflict issue. The two issues are multi-faceted and intertwined, and, as a factual matter, essentially uncontested.

In June of 1998, this matter first came to my attention. There had been discussion between Mr. Rupp and F.B.I. agents about a person Dan had met at a gun show. Dan expressed his concerns to the F.B.I., advising them that the man's disgruntled nature and expertise in deadly gases were alarming. The F.B.I. took note and wanted to enlist Mr. Rupp's further support, asking him to maintain contact, report those contacts, and to be fitted with a "wire", so that the contacts would be recorded. After some hesitation, he reported these developments to Ms. McNorton and to me.

He was instructed by Ms. McNorton to discontinue further actions with the F.B.I. He was told that I deemed his course of action in alerting the F.B.I. commendable, but that given the adversarial role of a public defender office, further action on his part in this regard would be forbidden.

Mr. Dedmon also spoke with Dan. He, like Ms. McNorton and myself, discussed the difficulty we often have gaining the trust of clients, who believe that we, as a federal agency, are not really independent of the prosecution. Mr. Dedmon told Mr. Rupp that if it came about that people on our staff were known to be working in a continuing informant capacity, that would damage our institutional integrity. Mr. Rupp expressly agreed to refrain from further involvement, and was aware that such involvement could result in his termination.

Mr. Rupp now suggests that he believed only he could assist the F.B.I. in obtaining further information from and about the individual, and that he had no obligation to obey an order which would possibly cause thousands to

die ghastly deaths. A book, with grisly photographs, was presented at the hearing to support Mr. Rupp's grave concerns.

I find, however, that Mr. Rupp was not the only person who could assist the F.B.I. That agency conducts such investigations constantly. Dan admitted he was not essential to the investigation in June of 1998. However, when asked to continue a series of surreptious communications with the target of the investigation, at the behest of, and under the direction of, the F.B.I. Mr. Rupp readily agreed. Mr. Rupp, despite unmistakably clear instructions from Ms. McNorton to call for instructions even if incidental follow-up contact occurred, instead withheld his subsequent written communication to the target and the five or six F.B.I. meetings concerning future contacts with the target from everyone in the agency. Instead of desisting from this situation, he delved more deeply into it, even to the point of asking the F.B.I. about possible enlistment in the Witness Protection Program, which, as he must be aware, applies to an informant whose identity has become known.

Significantly, Mr. Rupp totally agreed to Ms. McNorton's, Mr. Dedmon's and my own parallel orders regarding the propriety of future intentional contacts, and the need to promptly report future unintentional contacts, or unforeseen developments. Mr. Rupp agreed without reservation. He did not express doubt over the legality of his orders, or take action to address unexpressed disagreement through the available grievance procedure. Instead, he was explicit in his agreement. he was advised that a decision by him to continue in disregard of our agreed action would lead to immediate termination.

Mr. Rupp now argues that he had, and has, an absolute right to do as he did. Yet no such argument was made in June of 1998, when it could have been addressed without imperiling his job. Mr. Rupp told us that "I felt compelled to do whatever they asked". "They" refers to F.B.I. Agent Vick. This position was kept secret from our office. Only an inadvertent statement by Mr. Rupp led to discovery of the situation.

It is not lightly that I come to the conclusion to make Mr. Rupp's termination final. Yet the situation created by his covert F.B.I. activity is intolerable. We had an employee with access to all of our confidential documents having secret meetings with the F.B.I. against not only my explicit order, but also his own promise, made in seeming sincerity, but not in good faith. It is among the most serious category of employee misconduct with which I have been presented, and placed at risk is the institutional integrity of the entire office. When combined with the willful and deceptive nature of the events, it is not possible to reverse the earlier decision. Accoringly [sic], the discharge of K. Daniel Rupp is affirmed and final.

Sincerely yours,

/s/ David J. Phillips
DAVID J. PHILLIPS
FEDERAL PUBLIC DEFENDER
For the District of Kansas

DJP/dmr

COPY OF TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plaintiff,

Case No. 99-2101-WEA

vs.

DAVID J. PHILLIPS, in his personal capacity,

Defendant.

DEPOSITION
OF
CHARLES DEDMON,

taken on behalf of the Plaintiff, pursuant to Notice to Take Deposition, beginning at 12:50 p.m., on the 16th day of July, 1999, at the Capitol Plaza Hotel, 1717 Southwest Topeka Boulevard, in the City of Topeka, County of Shawnee, and State of Kansas, before Susan J. Morris, Certified Shorthand Reporter.

* * *

[73] Q. Was there ever any actual disruption of the Defender's Office as a result of Dan's activities?

A. Yes, I'd say so.

Q. What was that?

[74] A. In June, of course, we had to take time to resolve the question. That really wasn't that disruptive though because it was dealt with, and in September, I had very little time to devote to anything other than the capital case and the cases that I had that I couldn't get out

of that moved on a fairly quick deadline in federal court. Some were very important and were being tried as the capital case was going on. Cindy was involved with trying to understand how to coordinate the numerous investigative functions and paralegal functions. We were trying to learn how to make sure that we had the documents collected correctly and tabbed correctly so we could find them quickly. We were writing the second wave of what turned out to be many, many motions, probably 150 motions including memoranda, and this took our attention from that.

Q. That this what?

A. This recurrence of activity, this, the report from Dan to Cindy that he was still communicating with the FBI disrupted me from what I was doing.

[75] Q. Any other disruption?

A. I think people in Wichita were, I say people, I think Cyd Gilman in Wichita was distressed that Dan was having communications with the FBI without letting anybody know about, without letting anybody know and she expressed some concern in using him as an investigator.

Q. Anything else in terms of disruption?

A. We had used Dan on the capital case as a matter of necessity because he's down in Wichita. Because of that, there were going to be times when we needed to have somebody do something immediately in Wichita and Dan would be the most natural person to respond. I wouldn't have used him in sensitive matters so he became unavailable as far as I was concerned. Once I found out there was resurgence of contact, as far as I was

concerned, he was not available. We had to freeze him out of that case, even if Dave had not decided to discharge him, so I think that was a disruption, but of a brief duration.

[76] Q. Why would you have felt he couldn't, Dan couldn't be used?

A. Because if he's saying he's not having contact with the FBI and he's having direct contact with the FBI in a case in which we're going tooth and nail against people in the exact office, I don't know what else he's not telling me the truth on. It may be in some cases I could take that risk, but you can't take any risk in a capital case.

Q. Of course, he did come forward and tell about the contact, didn't he?

A. Well, yeah, he did.

Q. Did that make any difference to you?

A. No, it really didn't.

Q. Why not?

A. Because he came forward and divulged that he had been having continued contact with the FBI when he promised he would not and he also promised he would talk to us before he did and so he was committing a breach of faith. That's a bell you can't unring.

* * *

FEDERAL PUBLIC DEFENDER
DISTRICT OF KANSAS

[LOGO]

PERSONNEL POLICIES AND PROCEDURES MANUAL

David J. Phillips
Federal Public Defender
District of Kansas

Revised: August 1998

PERSONNEL POLICIES AND PROCEDURES MANUAL

Federal Public Defender, District of Kansas

This manual is intended to provide a written guideline of personnel benefits and responsibilities as well as clear definition of general office policies.

The contents of this manual are intended solely as a guide. Where applicable, the reference authority is cited. In the event of any contradiction between this manual and any statutory authority or rule guideline issued by the Administrative Office of the United States Courts or other appropriate regulating authority, that statutory or regulating authority controls.

The language used in this manual is not intended to constitute or create, nor is it to be construed to constitute or create, the terms of an employment contract between

the Office of the Federal Public Defender and any of its employees.

The terms and provisions contained herein are subject to change upon notice. Please notify me of questions concerning the information herein.

Revised: August 1998

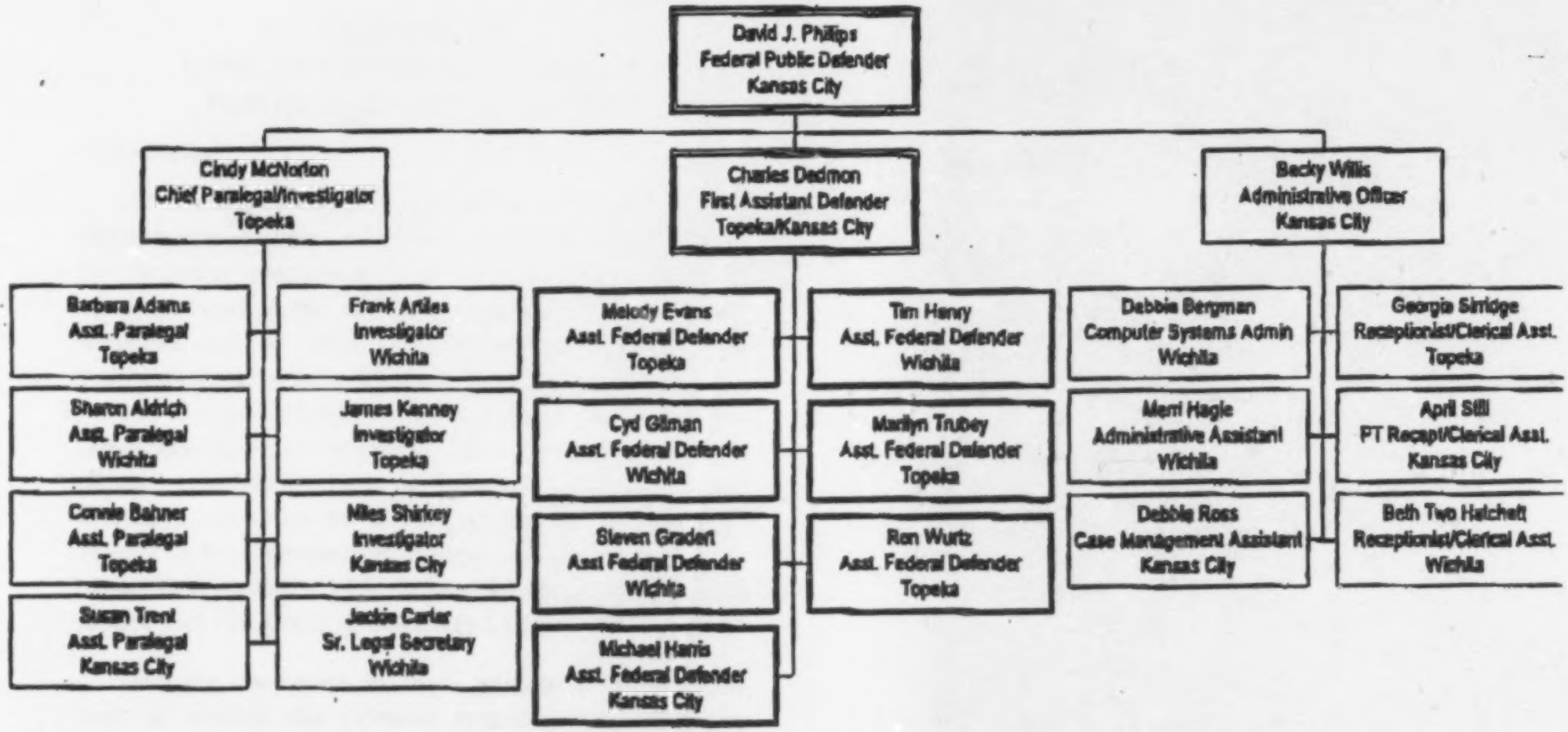
DAVID J. PHILLIPS
FEDERAL PUBLIC DEFENDER

FEDERAL PUBLIC DEFENDER, DISTRICT OF KANSAS

PURPOSE AND ORGANIZATIONAL STRUCTURE

This office exists to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act, and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services.

Every accused person, regardless of the alleged crime or offense, is entitled to zealous representation.



- **Charles Dedmon, First Assistant Federal Defender:** team leader for all attorneys in the office.
- **Cindy McNorton, Chief Investigator/Paralegal:** team leader for all of the paralegals, investigators and legal secretaries in the office.
- **Becky Willis, Administrative Officer:** team leader for the administrative, systems and office support staff.

BEST AVAILABLE COPY

August 1998

CHAPTER SIX
CODE OF CONDUCT FOR FEDERAL PUBLIC DEFENDER EMPLOYEES

Introduction:

This code of conduct applies to all federal public defender employees.[1] As used in this code, "federal public defender employees" (or "defender employees") means federal public defenders, assistant federal public defender, and all other staff employees of the federal public defender office. "Public defenders" means only the federal public defenders and assistant federal public defenders. This code of conduct does not apply to private counsel appointed under the Criminal Justice Act, or to attorneys provided by a bar association or legal aid agency or by a community defender organization established in accordance with the provisions of the Criminal Justice Act (18 U.S.C. § 3006A(g)(2)(B)).

Nothing contained in these canons is intended to limit or modify the primary responsibility of public defenders, as appointed counsel, to render effective legal representation to clients as required by the Constitution and laws of the United States and by applicable rules governing professional conduct, including the codes of professional responsibility applicable in the jurisdiction in which the public defender practices.

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[1] When Actually Employed (WAE) employees are subject to cannons 1, 2, and 3 and such other provisions of this code as may be determined by the appointment authority.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this code. Defender employees (other than the federal public defender) should consult with the federal public defender, and the federal public defender may consult with the court of appeals, for guidance on questions concerning this code and its applicability before a request for an advisory opinion is made to the Committee on Codes of Conduct. In assessing the propriety of one's proposed conduct, a defender employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations[2] (*e.g.*, receipt of a gift may implicate canon 2 as well as canon 5C(2) and the Ethics Reform Act gift regulations). Should a question remain after this consultation, the affected defender employee may request an advisory opinion from the Committee. Request for advisory opinions may be addressed to the Chairman of the Committee on Codes of Conduct in care of the General Counsel, Administrative Office of the United States Courts, One Columbus Circle, N.E., Washington, D.C. 20544.

Adopted September 19, 1995 by
the Judicial Conference of the
United States
Effective January 1, 1996

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[2] *See the Guide to Judiciary Policies and Procedures*, Volume II, Chapter VI, Statutory and Regulatory Provisions Relating to the Conduct of Judges and Judicial Employees.

CANON 1: A FEDERAL PUBLIC DEFENDER EMPLOYEES SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE OFFICE

An independent and honorable defender system is indispensable to justice in our society. A defender employee should personally observe high standards of conduct so that the integrity and independence of the office are preserved and so that the defender office reflects a devotion to serving the public defender's clients and the principle of equal justice under law. Defender employees should require adherence to such standards by personnel subject to their direction and control. The provisions of this code should be construed and applied to further these objectives. The standards of this code shall not affect or preclude other more stringent standards required by law, by applicable codes of professional responsibility, by court order, or by the federal public defender.

CANON 2: A FEDERAL PUBLIC DEFENDER EMPLOYEE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A defender employee should not engage in any activities that would put into question the propriety of the defender employee's conduct in carrying out the duties of the office. A defender employee should not use public office for private gain.

CANON 3: A FEDERAL PUBLIC DEFENDER EMPLOYEE SHOULD ADHERE TO APPROPRIATE STANDARDS IN PERFORMING THE DUTIES OF THE OFFICE

In performing the duties prescribed by law, by resolution of the Judicial Conference of the United States, by court order, or by the federal public defender, the following standards apply:

A. A defender employee should respect and comply with the law and these canons. A defender employee should report to the appropriate supervising authority any attempt to induce the defender employee to violate these canons.

Note: A number of criminal statutes of general applicability govern defender employees' performance of official duties. These include:

18 U.S.C. § 201 (bribery of public officials and witnesses);

18 U.S.C. § 211 (acceptance or solicitation to obtain appointive public office);

18 U.S.C. § 285 (taking or using papers relating to government claims);

18 U.S.C. § 287 (false, fictitious, or fraudulent claims against the government);

18 U.S.C. § 508 (counterfeiting or forging transportation requests);

18 U.S.C. § 641 (embezzlement or conversion of government money, property, or records);

18 U.S.C. § 643 (failing to account for public money);

18 U.S.C. § 798 and 50 U.S.C. § 783 (disclosure of classified information);

18 U.S.C. § 1001 (fraud or false statements in a government matter);

18 U.S.C. § 1719 (misuse of franking privilege);

18 U.S.C. § 2071 (concealing, removing, or mutilating a public record);

31 U.S.C. § 1344 (misuse of government vehicle);

31 U.S.C. § 3729 (false claims against the government).

This is not a comprehensive listing but sets forth some of the more significant provisions with which defender employees should be familiar.

B. A defender employee should be faithful to professional standards and maintain competence in the defender employee's profession.

C. A defender employee should be patient, dignified, respectful, and courteous to all persons with whom the defender employee deals in an official capacity, and should require similar conduct of personnel subject to the defender employee's direction and control. A defender employee should diligently discharge the responsibilities of the office in a nondiscriminatory fashion.

D. A defender employee should not solicit or accept a payment of money or anything of value from a client, except that a defender employee may accept an appropriate memento or token that is neither money nor of commercial value. A defender employee should never disclose any confidential communications from a client, or any other confidential information received in the course of official duties, except as authorized by law. A former defender employee

should observe the same restrictions on disclosure of confidential information that apply to a current defender employee.

E. A defender employee should not engage in nepotism prohibited by law.

Note: See also 5 U.S.C. § 3110 (employment of relatives); 28 U.S.C. § 458 (employment of judges' relatives).

Conflicts of Interest.

(1) In providing legal representation to clients, a public defender should observe applicable rules of professional conduct governing the disclosure and avoidance of conflicts of interest.

(2) In the performance of administrative duties, a defender employee should avoid conflicts of interest. A conflict of interest arises when a defender employee knows that he or she (or the spouse, minor child residing in the defender employee's household, or other close relative of the defender employee) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the defender employee's ability properly to perform administrative duties.

(3) When a defender employee knows that a conflict of interest may be presented in the performance of duties, the defender employee should promptly inform the federal public defender. The federal public defender, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the defender employee's performance of duties in such a matter so as to avoid a conflict or the appearance of a conflict of interest. If the conflict involves a conflict between or among

clients, the federal public defender should consider withdrawal from one or more representations, or other appropriate remedial actions, as necessary to comply with applicable rules of professional conduct. A defender employee should observe any restrictions imposed by the federal public defender in this regard.

* * *

MOTION FILED
DEC 1 0 2001

No. 01-685

In the Supreme Court of the United States

K. DANIEL RUPP,

Petitioner,

v.

DAVID PHILLIPS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION AND BRIEF OF *AMICUS CURIAE* FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION IN SUPPORT OF PETITIONER

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No.01-685

IN THE

Supreme Court of the United States

K. DANIEL RUPP,

Petitioner,

v.

DAVID PHILLIPS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

MOTION OF FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Movant Federal Law Enforcement Officers Association. ("FLEOA") hereby seeks leave to file a brief *amicus curiae* in support of the Petition of K. Daniel Rupp for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.[1]

---

[1]Petitioner has consented to this *amicus* brief.

The FLEOA is a voluntary, non-partisan professional association representing approximately 19,000 federal law enforcement officers and special agents from over fifty-seven agencies of the federal government. These agencies include the U.S. Secret Service; Bureau of Alcohol, Tobacco and Firearms; Internal Revenue Service - Criminal Investigations and Inspection; U.S. Customs, Drug Enforcement Administration; Federal Bureau of Investigation; Immigration and Naturalization Service; U.S. Marshals Service; Postal Inspection Service; Probation and Pretrial Services; Naval Criminal Investigative Service; Coast Guard Investigative Service; the Diplomatic Security Service in the State Department; U.S. Park Police - DOI; Bureau of Land Management - Special Agents and Rangers; Defense Criminal Investigative Service and the Offices of Inspector General at the following departments: Agency of International Development, Agriculture, Commerce, Defense, Education, Energy, Environmental Protection Administration, Federal Deposit Insurance Corporation, Federal Emergency Management Agency, General Accounting Office, General Services Administration, Health and Human Services, Social Security Administration, Housing and Urban Development, Interior, Justice, Labor, Transportation and Treasury.

The law enforcement officers and special agents who are members of FLEOA and their associates are a significant part of the federal vanguard against domestic and international terrorism and the use of weapons of mass destruction in the United States. FLEOA members conduct investigations involving all aspects of criminal and terrorist activity and know firsthand the importance, and often the absolute necessity, of public cooperation in these investigations. Their years of experience have taught them that while other investigative

techniques can often assist in the conduct of successful investigations, and occasionally substitute for public cooperation, there is often no reasonable alternative to obtain the information in a timely and accurate manner.

The FLEOA believes the Tenth Circuit decision forces public employee witnesses to make decisions about the importance of their information and the necessity of their cooperation with law enforcement that they cannot reasonably make at the time they provide the information and cooperation. Indeed, federal law enforcement officers often cannot make that judgment at the time the information and cooperation is offered. Moreover, the Tenth Circuit decision makes the unfounded assumption that by merely reporting some information about a matter involving weapons of mass destruction that federal law enforcement authorities will be able to supplant the citizen-witness information and cooperation with other similar cooperation or by use of other investigative techniques. The collective experience of FLEOA members is to the contrary.

Finally, the FLEOA believes that if the government is to continually exhort the public for information and cooperation, often characterized as a public duty, there should be a corresponding right of the public, including public employees, to provide that information and cooperation, especially in matters involving significant threats to the public or the use of weapons of mass destruction and that any restriction of this right should be examined under the strict scrutiny standard.

Respectfully submitted,

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Dated: December 10, 2001

No.01-685

IN THE

Supreme Court of the United States

K. DANIEL RUPP,

Petitioner,

v.

DAVID PHILLIPS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF *AMICUS CURIAE*
FEDERAL LAW ENFORCEMENT OFFICERS
ASSOCIATION
IN SUPPORT OF PETITIONER

QUESTIONS PRESENTED

Amicus Federal Law Enforcement Officers Association believes that certiorari should be granted on the following questions, which are fairly encompassed by the Petition's questions presented:

1. May government employees be fired, without legal recourse, for cooperating with law enforcement's efforts to prevent domestic terrorism?

2. May a court decide as a matter of law that the compelling national interest in safeguarding citizen cooperation with law enforcement officers in the prevention of terrorism is outweighed by a federal public defender's asserted interest in prohibiting such cooperation?

3. Does a public employee have a general right to cooperate with law enforcement and under what circumstances may that right be circumscribed?

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INTEREST OF *AMICUS*

The interest of *amicus* Federal Law Enforcement Officers Association ('FLEOA") is set forth in the accompanying motion for leave to file this brief.[1]

REASONS FOR GRANTING THE WRIT

The tragic events of September 11, 2001 and the subsequent deaths from weapons grade or near weapons grade anthrax have brought home to the public the threat of terrorism and the effect that the use, or even the threat of the use, of weapons of mass destruction can have on the populace, the economy and the government. However, these events have not changed the fundamental nature of successful investigations, but have only emphasized the importance of those investigations.

Amicus FLEOA fully supports the First Amendment and public policy reasons for granting the writ set forth Rupp's Petition for Certiorari and makes the following observations:

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[1]This brief has been authored entirely by counsel for *amicus* FLEOA, and no other person or entity has made any monetary contribution to its preparation or submission.

I. THE TENTH CIRCUIT'S RATIONALE FORCES PUBLIC EMPLOYEES TO MAKE THE IMPOSSIBLE DECISION OF WHETHER THEIR INFORMATION AND COOPERATION IN A CRIMINAL OR NATIONAL SECURITY INVESTIGATION OUTWEIGHS THE INDIVIDUAL INTERESTS OF THE OFFICE FOR WHICH THEY WORK

The Tenth Circuit concluded that "Mr. Rupp's continued cooperation with the FBI did not implicate the same level of public concern as the speech of employees who expose official wrongdoing or participate in protected political activity." *Rupp v. Phillips*, No. 99-3355, 2001 WL 826656, at *7 (10th Cir. July 23, 2001). The Tenth Circuit believed that the four part test set forth in *Pickering* v. *Board of Education of Township High School District 205,* 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 138 (1983) required it to balance the "specific public concern with Mr. Rupp's continued participation in this investigation" with the interests of the Federal Public Defenders Office. *Rupp*, 2001 WL 826656, at *6. Presumably, then, to avoid termination, Rupp would have been required to perform the same analysis at the time of his cooperation.

Almost no public employee will ever have sufficient information or expertise to make such a decision. The public employee is in a poor position to judge the importance of his information to law enforcement. In many situations law enforcement will not tell witnesses how singular their information is, how it fits into any investigation and whether that investigation is important, or even whether there is an investigation. In other circumstances, law enforcement will seek the continued cooperation of the witness, but provide the

witness little or no information about the nature, importance, or direction of the investigation much less the importance of their cooperation. These measures are taken to protect the investigation, protect the privacy of others, and to ensure that multiple sources, if they exist, are providing independent information. The witness can reasonably conclude that by seeking continued cooperation, law enforcement believes the cooperation is valuable, but the witness often will have no way to know to what degree. To then require the public employee to weigh the decision of whether to cooperate with an investigation of the use of weapons of mass destruction against the instructions of a superior not to cooperate puts the public employee in an impossible position.

Moreover, if guided by the Tenth Circuit's rationale, public employees will have to come to the counterintuitive conclusion that the rather mundane interests of their office will take precedence over information and cooperation with law enforcement, even in investigations involving significant threats to the public and the use of biological weapons of mass destruction. Hopefully most will choose as Rupp did, to place the interest of the public ahead of their own personal interests in continued employment, but that sacrifice should not be required.

II. LAW ENFORCEMENT OFFICERS SHOULD NOT BE REQUIRED TO DECIDE WHETHER THE PUBLIC EMPLOYEE WITNESS HAS INFORMATION OR CAN PROVIDE COOPERATION OF SUFFICIENT VALUE TO WITHSTAND A TERMINATION ACTION BY THE EMPLOYEE'S OFFICE

The Tenth Circuit recognized that the FBI continued to seek Rupp's cooperation knowing that Rupp's position with the Federal Public Defender's Office was at risk. *Rupp*, 2001 WL 826656, at *2. In fact, the FBI assured Rupp that he could not be terminated for his cooperation. *Id.* In the instant case, it appears that the FBI wanted Rupp's full cooperation, but tried, unsuccessfully, to accommodate his job concerns, by scaling back on his participation in the investigation.

The Tenth Circuit failed to recognize the impossible burden it has created for law enforcement officers who know that public employees who cooperate with them may face termination for their cooperation. The officer may have no way of knowing at the outset whether the public employee witness has unique access to timely information. The officer may not even know if there are other ongoing investigations of the subject. The officer may have no means of determining whether other witnesses can be developed, whether other investigative techniques will succeed, and whether the ability to use other techniques would depend upon the witness, such as providing probable cause for warrants and wiretaps at a later date.

Even if the law enforcement officer is in the unlikely position of being able to assess the importance of the public

employee witness' cooperation, he will almost assuredly be unable to make an informed decision of whether the interests of the employee's office outweigh the interests of the investigation. His analysis will understandably be colored by his duties. This issue could possibly be resolved through contact with the employer, which is not always feasible, but becomes a hopeless conundrum once the employer has threatened termination and contacts between the employer and law enforcement cease, as they did in this case.

Apparently, to date, the tactics chosen by the FBI have been successful insofar as Tobiason is not known to have carried out his threats. Nevertheless, over time, requiring law enforcement officers to make these decisions will likely cause them to either forego seeking cooperation which will later prove to have been vital to the investigation or going forward knowing that the public employee's position is at risk.

The Tenth Circuit attempts to hedge the balancing test by stating that "if there had been some indication that Mr. Rupp's continued assistance with the investigation was imperative, our balancing assessment could well be different." *Rupp*, 2001 WL 826656, at *7 n.2. The FLEOA believes that an "imperative" standard is far too strict for judging the importance of witness cooperation, and an almost unreachable standard at the outset of an investigation. Had Tobiason carried out his threats, then most law enforcement officers would conclude that Rupp's full cooperation would have been imperative in order to prevent the use of biological weapons, but the FBI could not know that at the time of Rupp's cooperation. The public employee witness' position and the law enforcement officer's judgment on the value of the cooperation become contingent upon the actions of

the subject of the criminal or terrorism investigation rather than their current assessment of the situation.

III. THE TENTH CIRCUIT MADE INCORRECT ASSUMPTIONS ABOUT THE IMPORTANCE OF CONTINUED COOPERATION BY PUBLIC EMPLOYEE WITNESSES

The Tenth Circuit concluded that "once Mr. Rupp had tipped the FBI, it was certainly capable of carrying out an investigation of Mr. Tobiason with or without Mr. Rupp's help." *Rupp*, 2001 WL 826656, at *7. The Tenth Circuit further concluded that his continued contact with the FBI was not speech that was "as new or as irreplaceable as the most protected types of speech." *Id.*

The FLEOA believes the Tenth Circuit erred in not placing value on Rupp's continued cooperation. Obviously, the FBI would continue with its investigation of Tobiason based on the seriousness of the information Rupp provided about Tobiason's threats to use biological weapons of mass destruction. The assumption of the Tenth Circuit that all law enforcement needs is a tip belies the experience of the members of the FLEOA. Members of the public with unique and timely access to information are often irreplaceable as sources of information. The determination of whether continued cooperation is valuable or essential must be made when the information or cooperation is offered, not years later when the results of the investigation are known.

The FLEOA wishes to emphasize to the Court the importance of the nature of the information provided by Rupp, the importance of continued cooperation by members of the

public, including public employees, who are willing and able to cooperate. It is frequently difficult, if not impossible, to replace the crucial information that cooperating individuals such as Rupp can provide.

It is the experience of the FLEOA membership that human intelligence is often the best source of information. This Court has long dealt with issues of confidential informants and witnesses and their importance in establishing probable cause for search and arrest warrants. As Justice Harlan noted in *United States v. Harris*, 403 U.S. 573 (1971), "the ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis." *Id.* at 599 (Harlan, J. dissenting). The courtyard wall of FBI Headquarters bears the following inscription:

> The most effective weapon against crime is cooperation ... the efforts of all law enforcement agencies with the support and understanding of the American people.

Most criminals and terrorists attempt to cloak their activities, revealing their activities only to a finite number of associates or by inadvertence or successful investigation. Law enforcement has only that finite pool of human intelligence from which to draw, usually drastically reduced by the unwillingness of most of the knowledgeable people to cooperate. In cases of terrorism or weapons of mass destruction, witnesses such as Rupp are not fungible. Even resource intensive efforts may not succeed in finding another person with the degree of access that the original witness had who is willing to cooperate. Even if a second witness or

cooperating person can be developed, significant amounts of time may pass without law enforcement knowing about the activities of the suspect, leaving the public at great risk.

Searches, seizures, wiretaps, analysis of records, surveillance, and a myriad of other investigative techniques are effective, and sometimes sufficient, but in the vast majority of investigations, witnesses are the most essential element of the successful investigation. Direct and timely access to information of the nature provided by Rupp is often singular no matter what efforts of law enforcement follow. Rupp clearly was in a position to give more cooperation than he was permitted to give by his employer. For example, Rupp was in a position to be "wired." *Rupp*, 2001 WL 826656, at *6. Electronically recorded oral conversations are highly valuable as evidence, but can only be obtained by someone who can volunteer to engage the subject of the investigation in conversation or through the much more difficult to obtain non-consensual electronic surveillance requiring court authorization under the provisions of 18 U.S.C. §§ 2510 - 2522 (commonly referred to by law enforcement as Title III) or the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 *et seq.* No one may have been in the position to voluntarily record conversations with Tobiason except Rupp, and, in any event, neither Rupp nor the FBI could know at the time of Rupp's cooperation whether another witness could be developed.

It is unclear to the FLEOA why subsequent information provided by Rupp would be afforded less value than his initial information. It is the experience of the members of the FLEOA that the value of information from cooperating witnesses often increases exponentially as their cooperation progresses. They become more trusted by the subject who reveals more of his

operations to the witness. Law enforcement has the opportunity to assess the behavior and truthfulness of the witness and to corroborate their information. The witness becomes more comfortable with a stressful and sometimes very threatening situation and can thus be tasked or requested to take additional steps to obtain evidence. After a time, they can introduce the subject to law enforcement officers acting in undercover capacities. Subjects identify and even introduce the witnesses to co-conspirators. Such developments are often crucial to a successful investigation and they take repeated contacts over long periods of time.

The FLEOA strongly believes that human sources of intelligence are very often the most valuable source of evidence available in an investigation, and that continued cooperation of witnesses, including public employees, is highly valuable in almost all investigations and should be so considered when used in any balancing analysis against other interests.

IV. A GENERAL RIGHT TO COOPERATE WITH LAW ENFORCEMENT SHOULD BE RECOGNIZED AND ARTICULATED

The decision of the Tenth Circuit essentially finessed the issue of whether Mr. Rupp's continuing cooperation with the FBI constituted speech. *Rupp*, 2001 WL 826656, at *5, *5 n.1, resolving the matter instead based on a balancing of interests test. The Tenth Circuit clearly struggled with the issue and the parties argued the matter. Our review of the numerous cases involving public employee involvement with law enforcement resulting in adverse job actions against the employee reveals that these cases are decided on the basis of the free speech provisions of the First Amendment, even if more than simple

speech was involved, *e.g.*, continued cooperation, direction from law enforcement, etc.

The FLEOA believes that this Court should articulate and recognize a general right of the public to cooperate with law enforcement and place it on a level with the right to participate in the political process. The President, the Attorney General, governors, heads of federal, state, and local law enforcement agencies, and representatives continually call for the cooperation of the general public with law enforcement's efforts to fight crime and terrorism, often characterizing it as a public duty. The FLEOA believes there should be an articulated corresponding right for the public, including public employees, to provide that cooperation. That right should go beyond the right to speak on matters of public concern; it should incorporate the right to act in concert with law enforcement and other governmental authorities in a lawful manner. This participatory right should be afforded status similar to the right of public employees to engage in the political process, and any limitations place upon that right should be examined under the strict scrutiny standard.

CONCLUSION

This case presents important questions for the Court's consideration, which impact individuals, law enforcement, and public safety. The ability of public employees to cooperate with law enforcement has clearly been put at risk. The practical effect of the Tenth Circuits rationale on law enforcement's use of public employees to investigate terrorism and the use of weapons of mass destruction could be devastating. The need for clear and unequivocal guidance on these issues from this Court supports the grant of certiorari.

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12/19/01

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I. THE EXCHANGE OF ARGUMENTS CONFIRMS CERTAIN UNDISPUTED FACTS CENTRAL TO THIS CASE.

Whether by admission or omission, Phillips' Response confirms the undisputed nature of the following sequence of events:

- Daniel Rupp learned about a potential threat of biological warfare posed by Timothy Tobiason. (Response at 4).

- Rupp told the FBI what he had learned—an act that even Phillips concedes was protected by the First Amendment to the United States Constitution. (Response at 5, 15).

- Phillips does not claim that this contact was disruptive to the operations of the Federal Public Defender's Office in any respect. (Response at 1, 5).

- Nevertheless, Rupp's supervisors responded by banning Rupp from speaking again to the FBI on that subject, first by ordering him to have no involvement whatsoever in the FBI's investigation and then by ordering him to bring new information relevant to this suspect *to the Federal Public Defender's Office* and not to the FBI, so that Phillips could determine "how to proceed." (Response at 7).

- In response to an effort to discourage Tobiason from taking action, Rupp learned new and important information from Tobiason, regarding Tobiason's future intentions. (Response at 9).

- Rupp did not withhold this information from the FBI, but shared it with them out of a sense of moral and civic duty.

- Because Rupp had talked again to the FBI, Phillips fired Rupp. (Response at 11).

II. PHILLIPS CANNOT REBUT PETITIONER'S CONSTITUTIONAL CHALLENGES BY CHARACTERIZING RUPP'S COMMUNICATIONS TO THE FBI AS "DECEPTIVE."

Reduced to its essentials, Phillips' Response asserts that Rupp intentionally violated orders not to communicate with the FBI, and that Rupp was fired because his subsequent communications with the FBI were "deceptive" and "disruptive." (*See* Response at 7, 11, 15). These propositions are subject to fact disputes. (See Petition at 25-28). Nevertheless, even if deemed true, Phillips' factual assertions do not resolve the important constitutional issues presented in this Petition.

The disruption Phillips describes to justify Rupp's termination is not focused on whether Rupp's FBI communications themselves disrupted the Wichita Office of the Federal Public Defender ("FPD"). The asserted disruption stems from Rupp's failure to comply with Phillips' orders; the disruption is thus a consequence of those orders. Phillips' argument therefore begs the fundamental questions at the heart of this Petition: (1) Could Phillips lawfully prohibit Rupp from sharing information about prospective criminal activity by a non-client with the FBI?; and (2) Did Rupp have a constitutional right to communicate with the FBI despite that order?

In fact, Phillips' orders to Rupp were even broader than merely prohibiting communications with the FBI. To justify Rupp's termination for insubordination, Phillips describes the broad sweep of his orders to Rupp without defending the breadth of those orders. In so doing, Phillips actually makes it easier for this Court to appreciate the unconstitutional scope and impact of his directives to Rupp. According to Phillips, not only did members of his office prohibit further communications between Rupp and the FBI, he insisted that if Rupp received any incidental communications from the suspected bioterrorist (Tobiason), Rupp must bring such information to them rather than to the FBI. In the Response, Phillips states:

> Rupp said that he told the FBI that he would let them know if he heard from Tobiason. McNorton said "No, let us know and we'll see how to proceed."

(Response at 7) (quoting testimony of Cindy McNorton, Rupp's supervisor). Therefore, when evaluating Phillips' orders, this Court must examine the justification for a federal employer to insist that information relevant to law enforcement must first be presented to the employer for a determination of "how to proceed."

If Phillips cannot show the constitutionality of his directives when issued to Rupp, he cannot justify the termination based on the supposed insubordination or breach of trust by Rupp in failing to completely follow it.[1]

---

[1] Rupp's Petition explained why insubordination is not a constitutional basis for terminating a public employee if the insubordination related to an unconstitutional order. (Petition at 24). Phillips makes no effort to demonstrate otherwise.

When the prohibition was imposed, there was, at most, a "concern" by Rupp's supervisors about how criminal defendants might perceive the agency if Rupp were to become a witness for the prosecution and that fact were to become publicly known. Yet that "concern" is the antithesis of the "actual disruption" that this Court's rulings require before speech can be suppressed or punished.

Moreover, that ban was based on the provably false premise that it would be a violation of the agency's Code of Conduct for an investigator for the FPD to become involved in an investigation by the FBI. A review of the Code of Conduct (Response App. 72-8) does not support Phillips' contention that Rupp's communications with the FBI violated the Code—especially where the suspect was not a client of the Wichita Federal Public Defender's Office and had not been charged with any crime. (Indeed, the likelihood that Tobiason, a Nebraska resident, might become a client of the Wichita Office of the Federal Public Defender at some point in the future was highly speculative at best.)

Most significantly, attorneys (and their agents) are not forbidden from reporting information about pending or future crimes (Response App. 76), even when they may be in an attorney-client relationship with a potential suspect.[2] This Court must therefore examine whether Phillips' orders to Rupp and his subsequent termination of Rupp (citing

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[2] Rule 1.6(b)(1) of the Kansas Rules of Professional Conduct governing "Confidentiality of Information" states that, even with respect to an existing client,

> "A lawyer may reveal such [privileged] information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime;"

purported "conflict of interest grounds") were legitimate and constitutionally justified.

Finally, even the Tenth Circuit recognized that Rupp may have rights to act as he did without losing his job. (App. 13 n. 4). Phillips' emphasis on Rupp's supposed "deception" was not a discernable part of the Tenth Circuit analysis. (App. 10-15). To the contrary, the Tenth Circuit suggested that if "Mr. Rupp's continued assistance with the investigation was imperative, our balancing assessment could well be different." (App. 13 n. 4). Petitioner has challenged the introduction of such an unprecedented and unpredictable test to justify the exercise of rights of free speech. Nevertheless, even the Tenth Circuit would have protected Rupp's "disobedience" had it deemed such communications "imperative." This Reply Brief therefore turns to whether such a test based upon the "imperative" character of information about crime is constitutionally defensible.

III. PHILLIPS DOES NOT ADDRESS RUPP'S CHALLENGE TO THE TENTH CIRCUIT'S REQUIREMENT THAT INFORMATION SHARED WITH THE FBI MUST BE "IRREPLACEABLE" AND "NEW" TO QUALIFY FOR FIRST AMENDMENT PROTECTION.

The first portion of Rupp's Petition challenged the wisdom of three key legal rules that the Tenth Circuit relied upon in evaluating Rupp's continued cooperation with the FBI. The Tenth Circuit held that continued cooperation with law enforcement is not worthy of significant protection unless:

1) the speaker's involvement is "irreplaceable;"

2) the information communicated was "new;" and

3) the information concerned public, not private, wrongdoing.

(App. 10-13).

Phillips has made little effort to justify any of these three rules. His Response makes no attempt to tie any of these rules to a doctrinal foundation in the First Amendment jurisprudence of this Court. His Response instead accepts the wisdom of each of these rules, and simply attempts to show that two of them apply to Rupp's speech.[3]

The Tenth Circuit adopted a rule that required Rupp to prove that he was "irreplaceable" to the FBI's investigation of Tobiason. (App. 12). Without attempting to defend the wisdom of this distinction, Phillips simply represents—on six different occasions—that FBI Agent Vick specifically testified that Petitioner's cooperation in the investigation was unnecessary. (Response at 24).[4]

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[3] Notably, Phillips makes no attempt to defend the Tenth Circuit's conclusion that the speech for which Rupp was fired was not "new." As demonstrated in the Petition, the communications with the FBI for which Rupp was fired included new and compelling information regarding the present intentions of a potential bioterrorist. (Petition at 18-19). Although the Tenth Circuit ignored this evidence, Phillips nevertheless seeks to protect that ruling from review.

[4] Phillips convinced the Tenth Circuit to agree. The Tenth Circuit panel stated that the FBI "was certainly capable of carrying out an investigation of Mr. Tobiason with or without Mr. Rupp's help. Indeed, Agent Vick testified to this fact." (App. 12). To underscore this consideration, the Tenth Circuit panel added:

"In addition, if there had been some indication that

With all due respect to Phillips and his counsel, that is an answer which they failed to extract from Vick in his deposition.[5] The actual questions posed to Vick on this topic, and his actual answers, are different in critical respects:

> Q. Do you feel the FBI was capable of investigating Mr. Tobiason without the assistance of Mr. Rupp?
>
> MS. KARLIN: Objection. It's outside the scope,

> Mr. Rupp's continued assistance with the investigation was imperative, our balancing assessment could well be different."

(App. 13 n. 4).

[5] This portion of Agent Vick's deposition testimony is described throughout Phillips' Response–but never accurately. *See* Response at 8 ("From the beginning of Petitioner's involvement with the FBI, Agent Vick felt that the investigation and potential prosecution of Tobiason could occur without Petitioner's assistance"); *id.* at 8 n. 4 (referring to "Agent Vick's testimony that Petitioner was unnecessary to the investigation and prosecution of Tobiason"); *id.* at 16 ("FBI Agent Vick specifically testified that Petitioner's cooperation in the investigation was unnecessary"); *id.* at 24 ("FBI Agent Vick testified that Petitioner was unnecessary to the investigation and potential prosecution of Tobiason"); *id.* at 25 ("The balance weighs even more heavily in favor of Respondent considering Petitioner's participation was unnecessary."); *id.* at 30 ("The fact remains that Agent Vick specifically testified that the FBI did not need Petitioner's assistance 'to continue with any investigation and potential prosecution of Mr. Tobiason.'"). The Response also represents, incorrectly, that "*Petitioner's* sworn deposition testimony verifies that . . . the FBI felt Petitioner's continued involvement was unnecessary. (Response at 26-27)(emphasis added).

instruct him not to testify.

A. Prefer not to answer that.

****

Q. So based on your involvement with Mr. Rupp in this investigation—let me strike that. *Based on the arrangement that you made with Mr. Rupp at the beginning of his involvement with this investigation,* you were *proceeding under the assumption* that you *would be able to continue* with any investigation and potential prosecution of Mr. Tobiason without the assistance of Mr. Rupp?

A. Yes.

Q. Therefore, he wasn't vital to the prosecution of Mr. Tobiason?

A. By—I'm struggling with—

Q. I'll withdraw the question.

A. —with the vital part.

Q. I'll withdraw the question.

Mr. Fischer: Nothing further.

Mr. Hollis: Nothing further.

(The deposition concluded at 11:50 a.m.)

(Response App. 36-38)(emphasis).

Perhaps Phillips does not address the Tenth Circuit's "irreplaceable" information standard because it cannot be logically defended. As the Federal Law Enforcement Officers Association (FLEOA) emphasizes in moving for amicus status, ". . . the Tenth Circuit decision forces public employee witnesses to make decisions about the importance of their information and the necessity of their cooperation with law enforcement that they cannot reasonably make at the time they provide the information and cooperation. *Indeed, federal law enforcement officers often cannot reasonably make that judgment at the time the information and cooperation is offered.*" Motion of FLEOA for leave to File Brief *Amicus Curiae, et al.*, p. 3 (emphasis added).

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Respectfully submitted,

By_____

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